Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

1996 Term

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

COUNTY OF SANTA CLARA, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANE MCKENNA, ZOE LOFGREN, RON GONZALES, ROD DIRIDON, MICHAEL HONDA, SALLY REID, PAUL SAGERS, PETER CLAUS, GEORGE TOKUSHIGE, DOWARD WASHINGTON, LEODE FRANKLIN, GREG WASENHOVE, IMELDA ELONZO, THOMAS FINN, ET. AL. THROUGH 100

Appellees & Respondents

No. 94-16824

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. ISSUES PRESENTED FOR REVIEW

1. AMERICANS WITH DISABILITIES ACT ISSUES:

a. When do claims for wrongful discrimination, and wrongful termination under the American's with Disabilities Act, 42 U.S.C.S.. 12101 et. seq. ripen: 1) when the disability occurs — *the date determined in this case;* 2) or when refusal to accommodate occurs the first time, at the time of notice of a year of unpaid, unrequested medical leave; 3) or later, after renewed request for accommodation at approach of the end of the one year unpaid leave, upon refusal to discuss accommodation; or 4) or later still when refusal to accommodate takes the form of defacto termination?

b. When Congress has set up a specific administrative process preliminary to the court process, as in the case of the American's with Disabilities Act, and the agency assigned, the EEOC in this case, has been assigned a specific fact finding role and has found evidence of discrimination, defacto termination, and timeliness, and has issued a right to sue letter, can a federal judge, who has not conducted an investigation and himself is not assigned a fact finding role, rule "failure to state a claim" on timeliness, as here?

2. TENTH AMENDMENT, U.S. CONSTITUTION: STATE CAUSES OF ACTION: What is the responsibility of the federal courts to address state causes of action in a primarily state complaint removed to federal court by defendants? Do the California Constitution, statutes, regulations, and the guarantees therein evaporate when a case is removed to Federal Courts, as here?

3. WORKER'S COMPENSATION: Does State Worker's Compensation system nullify California separate Whistle blower statutes? Does Worker's Compensation system preclude recovery for deliberate torts, or later adopted statutes which allow an action for damages in their breech. When worker's compensation system has no mechanism for review of torts or whistle blower complaints does Worker's Compensation system nevertheless preclude recovery? Are specific statutes giving worker leave to seek civil damages annulled by worker's compensation scheme which does not provide for a trial by jury or any mechanism to determine fault arising outside of or even within the Labor Code?

4. Cases on point in the state and federal courts, including a published case decided on the same day by the Ninth Circuit by a different panel of judges, are at odds with the decision.

B. LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

(1) COUNTY OF SANTA CLARA,
(2) SANTA CLARA COUNTY BOARD OF SUPERVISORS,
(3) DIANE MCKENNA,
(4) ZOE LOFGREN,
(5) RON GONZALES,
(6) ROD DIRIDON,
(7) MICHAEL HONDA,
(8) SALLY REID,
(9) PAUL SAGERS,
(10) PETER CLAUS,
(11) GEORGE TOKUSHIGE,
(12) DOWARD WASHINGTON,
(13) APPLIED PEST MANGEMENT, INC.,*
(14) GREGORY CLARK*,
(15) INSTAR PEST CONSULTANT'S INC.,*
(16) LEODE FRANKLIN,
(17) GREG WASENHOVE,
(18) IMELDA ELONZO
(19) THOMAS FINN,
ET. AL. (DOES) THROUGH 100

Appellees & Respondents

*Defendant's numbered (13), (14) and (15) above were reinstated in the Complaint by the United States Court of Appeal for the Ninth Circuit and are not subject to this Petition.

C. TABLE OF CONTENTS

A.	**ISSUES PRESENTED FOR REVIEW** . . .	i
B.	**LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.**	ii
C.	**TABLE OF CONTENTS**	iii
D.	**TABLE OF AUTHORITIES**	vi
1.	TABLE OF CASES	vi
2.	CONSTITUTIONAL AMENDMENTS	viii
3.	STATUTES AND RULES	ix
4.	OTHER AUTHORITIES	ix
E.	**ORDERS, MEMORANDUM, AND JUDGMENTS**	x
F.	**STATEMENT OF GROUNDS ON WHICH JURISDICTION IS BASE**	x
G.	**CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS, VERBATIM**	x
H.	**STATEMENT OF THE CASE.**	1
1.	History in the District Court.	6
2.	History in the United States Court of Appeals for the Ninth Circuit.	9
I.	**INTRODUCTION**	9
1.	Outline of Issues Presented For Consideration by the Supreme Court.	9
2.	Fundamental State Issues in the Removed Complaint Were Not Addressed in the Memorandum of The U. S. Court of Appeals for the Ninth Circuit.	10
3.	Facts in the Record and Key Statutes May Have Been Overlooked.	10

C. TABLE OF CONTENTS, CONTINUED

4.	The Taking of Petitioner's Job Under the Circumstances is Against Fundamental Public Policy. The Worker's Compensation System Does Not Have Authority to Compensate for Petitioner's Job Loss or Wage Loss, Only for Compensation for Disability Deficit. Specific Overlooked Code Sections Allow for Recovery of Wages and Restoration of Job Rights. If the County is Dismissed from all Causes of Action, There is No True Remedy.	11
5.	Summary of Argument	11
J.	**ARGUMENT**	11
1.	Accrual of Cause of Action Under the American's With Disabilities Act was Determined by the Wrong Test—Date of Onset of Disability. This Incorrect Test is in Conflict with the Act, with the Purposes of the Act, and in Conflict with Newly Developing Federal Appellate Case Law.	11
2.	It is an Abuse of Discretion to Overlook the Claims Made Under the California Statutes, and California Established Policy.	15
3.	Constitutional Causes of Action.	16
4.	California Governmental Employee Immunity is a Qualified Immunity and Does Not Protect Those Who Knowingly Break the Law, Those Who Violate the California Constitution, Those Who Commit Torts, and It Does Not Protect Employees With Immunity Where the Governmental Agency Itself is Not Immune.	20
5.	State Whistleblower Causes of Action Were Not Addressed in the Courts Below.	24
6.	Retaliatory Discharge is Without Recourse Within Worker's Compensation System.	26
7.	Petitioner Complied with the California Government Code Claims Act.	27

C. TABLE OF CONTENTS, CONTINUED

8.	Petitioner Has Standing to Assert her Right to Her Job and Wages Through the Government Code.	27
9.	Petitioner Should have Standing to Assert an Action Against Trespassers to Secure the Safety of Her Property, Freedom From Harassment and Freedom From Actual Damaging Trespass.	27
10..	Punitive damages should be allowedfor such damaging acts.	28
K.	**CONCLUSION AND RELIEF SOUGHT**	28

D. TABLE OF AUTHORITIES

1. TABLE OF CASES

Badih v. Myers, Cal.Rptr.2d 229, 231 (Cal.App. 16, 25
1 Dist. July 20, 1995)

Board of Regents of State Colleges v. Roth, 408 U.S. 564, . . . 20
92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972).

Buchanan v. City of Newport Beach (1975) 23
123 Cal.Rptr. 338, 50 C.A.3d 221.

Burfield v. Brown, Moore, Flint, Inc., 51 F.3d 583, ... 14, 15
(5th Cir. 1995).

Caplis v. Monterey County (1979) 158 Cal.Rptr. 395, ... 22
97 C.A.3d 249.

Clements V. Airport Authority of Washoe County, U.S.C.S. . . 24
9th, No. 93-16693, October 26, 1995, by Reinhardt, J.

Committee to Defend Reproductive Rights v. Myers 18
(1981) 29 C3d 252, 172 Cal.Rptr 866,
625 P.2d 779, 20 ALR4th 1118.

Cotnour v. University of Me. Sys. (1994, CA 1 Me) 35 F 3d 6 . 20

Cronin v. Town of Amesbury, 895 F.Supp 375 . . 15, 20, 21, 22

Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 699. . . 26

Glenn v. Clearman's Golden Cock Inn (1961) 26
192 Cal.App.2d 793, 797.

Greene v.Hawaiian Dredging Co. (1945) 22 Cal.2d 245, . . \ 26
157 P.2d 367.

Hofferber v. First Nat. Bank (1977, WD Okla) 20
437 FSupp 788.

In re Duncan (1987, 2nd Dist.) 189 Cal.App.3d 1348, ... 18
234 Cal.Rptr 877.

I. TABLE OF CASES, CONTINUED

Lundeen Coating Corp. v. Department of Water and Power of City of Los Angeles (App.2 Dist.1991) 283 Cal.Rptr. 551, 232 Cal.App.3d 816, rehearing denied, review denied. . . 23

Nagy v. Whittlesey Automotive Group (1995 Cal App 4th Dist.) 47 Cal.Rptr.2d 395. . . 16

Rojo v. Klinger (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373. .16, 25

Sanchez v. Unemployment Ins. Appr. Bd. (1984) 36 Cal.3d 575, 588, 205 Cal.Rptr. 501, 685 P.2d 61 24

Smith v. United Parcel Service of America, Inc. 65 F.3d 266 (2nd Cir. September 8, 1995) 13, 15

Tameny v. Atlantic Richfield Co., (1980) 27 Cal.3d 167, 164 Cal.Rptr 839, 610 P.2d 1330. . . . 25

Watson v. Department of Rehabilitation (App. 2 Dist. 1989) 261 Cal.Rptr. 204, 212, Cal App.3d 1271 27

2. CONSTITUTIONAL AMENDMENTS

FEDERAL CONSTITUTION AND RELATED GOVERNANCE: 16, 17
Tenth Amendment xii
Fifth Amendment . . . . . xii, 20
Fourteenth Amendment . . . . . xii, 15, 19, 20, 21
Declaration of Independence . . . . . xii, 20
The Constitution of the United States, Preamble . . . . . xii, 20
U.S. Constitution Article III, ... xii, 19, 20
California Constitution, Article 1: § 1. . . xii, 7, 11, 17, 18, 19, 20
California Constitution, Art. 1 § 24. . . . . xiii, 17
California Civil Code § 52.1. . . . . xiii, 7, 17, 18

3. STATUTES AND RULES

F.R.C.P. Rule 12 (b), (e) and (f) 6
42 U.S.C.S. § 1983 . . . . . xii, 6, 20
42 U.S.C.S. § 1343 (3) 29
American's With Disabilities Act,
42 U.S.C.S: 8, 10, 13, 14, 15, 16, 21
§ 12101. xi
§ 12111. xi
§ 12112. xii
§ 12131. xii
§ 12132. xii
§ 12133. xii

CALIFORNIA CIVIL CODE: § 43 . . . . . .
CALIFORNIA GOVERNMENT CODE
Calif. Claims Act (Calif. Gov. Code § 800 et. seq. 27, 28

§ 862. (b) xvi,8, 21, 22, 24
§ 815. . . . . xvi, 22
§ 815.6. . . . . xvi, 22
§ 818.4 22
§ 820.2 . . . . . xvi, 24
§ 820.8 . . . . . xvi, 22
§ 820.9 . . . . . xvi, 21
§ 835. . . . . xvi, 6, 22
§ 3503. . . . . xvii, 27
§ 12940 . . . . . xvi, 10, 16
§ 12940—12965 10
§ 53296.. . . . . .xviii, 10, 16, 24
§ 52298. . . . . xviii, 10, 24
§ 53298.5. . . . . xvi, 8, 10, 24

3. STATUTES AND RULES, CONTINUED

CALIFORNIA FOOD AND AGRICULTURE CODE
AGRICULTURAL CHEMICALS--ECONOMIC POISONS,
Division 7, Chapter 2

§ 12977. . . . . xix, 17
§ 12978. . . . . xix, 17
§ 12982. . . . . xix, 17
§ 12985. . . . . xx, 17
§ 12991. . . . . xx, 17
§ 14002. . . . . xx, 17
§ 14003. . . . . xxi, 17
§ 14011. . . . . xxi, 17

CALIFORNIA LABOR CODE
Labor Code Worker's Compensation Remedy . . . xxiii, 10, 11, 27
§ 98.7, ... xxi, 16
§ 1102.5. . . . . xxi, 16
§ 1103. 16
§ 1104. . . . . .xxi, 16
§ 1105. . . . . xxi, 8, 16
§ 6310 . . . . . xxi, 16
§ 6311. . . . . xxii, 27
§ 6312. . . . . .
§ 6400. . . . . xxii, 17
§ 6402. . . . . xxiii, 17
§ 6408. . . . . xx,iii, 17
§ 6409.3. . . . . xxiii, 17

California Health and Safety Code, Proposition 65 8

California Code of Regulations, Title 3 § 6618. . . . . xxiii, 17
California Code of Regulations, Title 3 § 6198. . . . . .
California Code of Regulations Title 3 § 6726 vxiii

4. OTHER AUTHORITIES

Prosser on Torts, p. 50, Ch 2, Keeton. 27

E. ORDERS, MEMORANDUM, AND JUDGMENTS

The following are the subject of this appeal:

1. Petition for rehearing regarding county defendant's denied December 1, 1995. (Appendix 1.)

2. Memorandum of the United States Court of Appeals for the Ninth Circuit filed and entered October 26, 1995, the judgment of the district court affirmed in part and reversed in part. (Appendix 2.) Judgment of the United States Court of Appeals for the Ninth Circuit filed and entered December 12, 1995. (Appendix 3)

3. District court judgment and orders include order of January 18, 1994 dismissing individual government defendants and dismissing certain causes of action (Appendix 4), the order of June 27, 1994 dismissing remaining causes as to County defendants and Finn (but not corporate defendants) (Appendix 5), and final Judgment, all parties: entered September 19, 1994 (Appendix 6) Date of filing appeal to United States Court of Appeal for the Ninth Circuit: October 17, 1994.

F. STATEMENT OF GROUNDS ON WHICH JURISDICTION IS BASED

1. *Date of entry of Memorandum sought to be reviewed:* Memorandum of the United States Court of Appeals for the Ninth Circuit filed and entered October 26, 1995, the district court affirmed in part and reversed in part. (Appendix 2.)

2. Date of filing and entry of Judgment of the United States Court of Appeal for the Ninth Circuit entered December 12, 1995 the district court affirmed in part and reversed in part. (Appendix 3.)

3. *Date of any order on Petition for rehearing:* December 1, 1995. (Appendix 1.)

4. *Statutory provisions conferring jurisdiction to review the judgment or decree:* 28 U.S.C.S. §§ 2106.

G. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS, VERBATIM

American's With Disabilities Act, 42 U.S.C.S. 12101 et. seq:

§ 12101. Congressional findings and purposes

. . . .

(b) Purpose. It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12111. Definitions

(5) **Employer.** (A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employee for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or and Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

. . .

(8) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this

description shall be considered evidence of the essential functions of the job.

. . . .

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

. . . .

(Effective date of this section: Act July 26, 1990, P. L. 101-336, Title I, § 108, 104 Stat. 337, which appears as 42 USCS § 12111 note, provides that this section is effective 24 months after enactment.)

. . . . . .

§ 12131. Definition As used in this title:

(1) **Public entity.** The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and . . . .

(2) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C.S. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

(July 26, 1990, P.L. 101-336, Title II, Subtitle A, § 201, 104 Stat. 337.) . . . 42 U.S.C.S. §§ 12131-12133 . . . shall become effective 18 months after the date of enactment of this act.)

FEDERAL CONSTITUTION AND RELATED GOVERNANCE:

42 U.S.C.S. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fifth Amendment: No person shall . . . be deprived of . . . life, liberty, or property . . . without due process of law . . .

Fourteenth Amendment: No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.

The Constitution of the United States, Preamble:

We the people of the United States, in order to establish a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.

CALIFORNIA CIVIL CODE: § 43. General Personal Rights

Besides the personal rights mentioned and recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

California Constitution, Article 1: § 1. Inalienable rights

Section 1. All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.
(Am. Nov. 5, 1974.) (Privacy originally added Nov. 7, 1972.)

California Constitution, Art. 1 § 24. Rights not dependent on federal constitution; rights reserved to the people

Sec. 24 Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

This declaration of rights may not be construed to impair or deny others retained by the people.

(Added Nov. 1974.)

California Civil Code § 52.1. Civil actions for protection of rights; damages, injunctive and other equitable relief; violation of orders

(a) Whenever a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring civil action for injunctive relief and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered

with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

(g) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved person under any other provisions of law.

(h) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees.

CALIFORNIA GOVERNMENT CODE

USE OF PESTICIDES,

§ 862. Use of economic poison or injurious materials; definitions

. . .

(b) A public entity is liable for injuries caused by its use of pesticide to the same extent as a private person except that no presumption of negligence arises from the failure of a public entity or a public employee to comply with the provision of a statute or regulation relating to the use of a pesticide if the statute or regulation by its terms is made inapplicable to the public entity or the public employee.

---

§ 815. Liability for injuries generally; immunity of public entity; defenses

Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

§ 815.6. Mandatory duty of public entity to protect against particular kinds of injuries

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular

kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

§ 820.2. Discretionary acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion be abused.

§ 820.8. Acts or omissions of others

Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligence or wrongful act or omission.

§ 820.9 Mayors, members of local public entities, boards, commissions and advisory bodies not vicariously liable for injuries caused by public entity

Members of city councils, mayors, members of boards of supervisors, members of school boards, members of governing boards of other local public entities, members of locally appointed boards and commissions, and members of locally appointed or elected advisory bodies are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body. Nothing in this section exonerates an official from liability for injury caused by that individual's own wrongful conduct. Nothing in this section affects the immunity of other public officials.

Public Entities and Employees,
DANGEROUS CONDITIONS OF PUBLIC PROPERTY
§835. Conditions of liability

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the

injury to have taken measures to protect against the dangerous condition.

---

§ 3503. Representation of members, membership admission and dismissal regulation; right of personal appearance

Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. . . . Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.

---

§ 12940 Employers, labor organizations, employment agencies and other persons; unlawful employment practices; exceptions

It shall be an unlawful employment practice, unless based on a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part.

(h)(1) For an employer, . . . or any other person, because of . . . . , physical disability, . . . medical condition, . . .to harass an employee or applicant. . . .

(i) For an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship on its operation.

DISCLOSURE OF INFORMATION: LOCAL GOVERNMENT

§ 53296. Definitions

Definitions used in this article:

(b) "Disciplinary action" means any direct form of discipline as defined in personnel rules and regulations adopted by the local agency. "Disciplinary action" shall include the firing of an employee.

(c) "Disclosure of information" means any written document containing evidence regarding gross mismanagement of a significant waste of funds, an abuse of authority, or substantial and specific danger to public health or safety.

(d) "Complaint means any written document containing a disclosure of information as specified in subdivision (c).

§ 53297. Filing complaint; exhaustion of administrative remedies; procedure; penalty of perjury

(a) An employee, or applicant for employment, shall have the right to file a complaint with the local agency within 60 days of the date of the act or event which is the subject of the complaint.

(b) Prior to filing a written complaint pursuant to this article, the employee shall first make a good faith effort to exhaust all available administrative remedies. The 60-day time limit specified in subdivision (a) shall be extended by the amount of time actually utilized by the employee in pursuing available administrative remedies.

(c) A complaint pursuant to this article shall be filed in accordance with the locally adopted administrative procedure. If there is no administrative procedure, the complaint shall be filed with the governing body.

(d) All complaints brought by employees under this article shall be filed under penalty of perjury.

§ 52298. Reprisals

(a) No local agency officer, manager, or supervisor shall take reprisal action against any employee or applicant for employment who files a complaint pursuant to Section 53297.

. . . .

§ 53298.5. Violations; punishment

(a) Any officer, manager, or supervisor who violates Section 53298 with malicious intent is punishable by a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for

up to a period of one year. In addition, any local agency officer, manager or supervisor who maliciously engages in conduct prohibited by Section 53298 shall be disciplined as provided by the local personnel rules and regulations.

(b) In addition to all other penalties provided by law, any local officer, manager, or supervisor who has been found by a court to have violated the provisions of Section 53298 with malicious intent shall be individually liable for damages in an action brought against him or her by the injured employee. Punitive damages may be awarded by the court where the offending party has acted with malice. Where liability has been established, the injured employee shall also be entitled to reasonable attorney's fees as provided by law. In no way, shall the provisions of this article establish any liability for punitive damages or any new cause of action against the local public entity other than the liabilities contained in existing law.

CALIFORNIA FOOD AND AGRICULTURE CODE AGRICULTURAL CHEMICALS--ECONOMIC POISONS, Division 7, Chapter 2

§ 12977. Enforcement

The director, and the commissioner of each county under the direction and supervision of the director, shall enforce the provisions of this article and the regulations adopted pursuant to it.

§ 12978. Pesticide applications on specified public property; posting of warning signs in English and Spanish; application of section

Pesticide applications on public property which takes place on school grounds, parks or other public rights-of-way where public exposure is foreseeable shall be posted with warning signs. The signs shall be in English and Spanish and shall contain a warning that the area has been treated with a pesticide and that individuals are not to enter the area.

(a) This section shall apply to all pesticide applications which have worker reentry intervals of at least 24 hours.

(b) Posting shall be accomplished immediately prior to pesticide application, and the signs shall be removed within 24 hours after the expiration of the reentry interval.

(c) Signs shall be posted at regular intervals and at all regular points of public entry.

(d) The agency may substitute a barrier for the warning signs to exclude public exposure to a treated area. (Added by Statute 1985.)

§ 12982. Enforcement

The director and the commissioner of each county under the direction and supervision of the director, shall enforce the provisions of this article and the regulations adopted pursuant to it. The local health officer may assist the director and the commissioner in the enforcement of the provisions of this article and any regulations adopted pursuant to it. The local health officer shall investigate any condition where a health hazard from pesticide use exists, and shall take such necessary action, in cooperation with the commissioner, to abate any such condition. The local health officer may call upon the State Department of Health Services for assistance pursuant to the provisions of Section 2951 of the Health and Safety Code.

§ 12985. Violations of worker safety reentry requirements

Any person who orders an employee to enter an area posted with a warning sign in violation of any worker safety reentry requirements promulgated pursuant to this article by the director is guilty of a misdemeanor. A violation of this article affecting any worker or workers constitutes a separate offense for each affected worker. (Added by statute, 1985)

§ 12991. Unlawful acts

It is unlawful for any person, by himself, or through another, in connection with any substance or mixture of substances included within the scope of this chapter, to do any of the following:

(a) Make any material or substantial misrepresentation.

(b) Make any false promises of a character likely to influence, induce or deceive.

(c) Engage in illegitimate business or dishonest dealing.

(d) Cause to be published or distributed any false or misleading literature, or cause to be displayed any false or misleading advertisement.

(e) For any person to use, store, transport, handle, or dispose of any economic poison, or any container which holds or has held such economic poison, except in compliance with the rules and regulations of the director.

§ 14002. Application to state and federal agencies

This chapter applies to all agencies of the United States and the State of California and its subdivisions or to their officers, agents or employees. Nothing in this section affects the liability of a public entity under Section 862 of the Government Code.

§ 14003. Liability

This article does not relieve any person from liability for any damage to the person or property of another person which is caused by the use of any restricted material.

§ 14011. Application of materials

It is unlawful for any person to apply any restricted material for which regulations have been adopted except as provided in the regulations which are adopted by the director.

CALIFORNIA LABOR CODE :

§ 1102.5.

(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

§ 1103.

Any employer who violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1000 or both and, in the case of a corporation, by a fine of not to exceed $5000.

§ 1104.

In all prosecutions under this chapter, the employer is responsible for the acts of his managers, officers, agents and employees.

§ 1105. Employee's action for damages

Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered in violation of this chapter.

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§ 6310

(a) No person shall discharge or in any manner discriminate against any employee because such employee has either: (1) made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his employer, or his representative, or (2) instituted or caused to be instituted any proceeding under or relating to his rights or has testified or is about

to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded him.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his employer because such employee has made a bona fide oral or written complaint to the division or any other governmental agency having statutory responsibility for or assisting the division with reference to employee safety or health, his employer, or his representative, of unsafe working conditions, or work practices, in his employment or place of employment shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

§ 6311. Retaliation for refusal to work in violation of health and safety standards; action for wages

No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board would be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time of the employee is without work as a result of the layoff or discharge. (Emphasis added.)

§ 6312. Discrimination complaint

An employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of Section 6310 or 6311 may file a complaint with the Labor Commissioner pursuant to Section 98.7.

§ 6400. Safe and healthful employment and place of employment

Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein.

§ 6402. Preventing entry into unsafe or unhealthful place

No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

§ 6408. Information for employees.

All employers shall provide information to employees in the following ways, as prescribed by authorized regulations:

. . . .

(d) Allow access by employees or their representatives to accurate records of employee exposures to potentially toxic materials or harmful physical agents.

(e) Notification of any employee who has been or is being exposed to toxic material or harmful physical agents in concentrations or at levels exceeding those prescribed by an applicable standard, order, or special order, and informing any employee so exposed of corrective action being taken.

§ 6409.3. Treatment for pesticide poisoning

In no case shall the treatment administered for pesticide poisoning or a condition suspected as pesticide poisoning be deemed to be first aid treatment.

Labor Code § 98.7

(a) Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any provision of this code under the jurisdiction of the Labor Commissioner may file a complaint with the division within 30 days after the occurrence of the violation.

. . . .

(f) The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other provision of law.

California Code of Regulations, Title 3

§ 6618

(a) Each person performing pest control shall give notice to the operator of the property to be treated before any pesticide is applied.

(b) The operator of the property shall give notice to all persons known to be on the treated property or likely to enter during the period of time any restrictions are in effect.

(c) Each notice shall specifically state the date of the application and identify the pesticide by brand name or common chemical name and be adequate to advise of the precautions, including reentry restrictions, to be observed as printed on the registered label or included in applicable laws and regulation.

(d) Compliance with Section 8538 of the Business and Professions Code meets the requirements specified in this section.

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§ 6726 Emergency Medical Care:

(c) When there is reasonable grounds to suspect that an employee has a pesticide illness or when an exposure to a pesticide has occurred that might reasonably be expected to lead to an employee's illness, the employer shall ensure that the employee is taken to a physician immediately.
Note the section is not part of the Labor Code (Worker's Compensation) and nothing in this section requires emergency care be through the Worker's Compensation process.

No._____

In The

Supreme Court of the United States

1996 Term

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

COUNTY OF SANTA CLARA, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANE MCKENNA, ZOE LOFGREN, RON GONZALES, ROD DIRIDON, MICHAEL HONDA, SALLY REID, PAUL SAGERS, PETER CLAUS, GEORGE TOKUSHIGE, DOWARD WASHINGTON, LEODE FRANKLIN, GREG WASENHOVE, IMELDA ELONZO, THOMAS FINN, ET. AL.. THROUGH 100

Appellees & Respondents

No . 94-16824

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cheriel Jensen, pro se
13737 Quito Road
Saratoga, CA 95070
1 408 379 0463

II. STATEMENT OF THE CASE

Unnoticed pesticide exposures took place in Petitioner's workplace during her working hours for 14 plus years without her knowledge, while Petitioner worked as a planner for the County of Santa Clara in the County Government Center high rise two tower building complex. At the same time, Petitioner suffered from an unexplained series of recurring illnesses of the same symptomatology, and then increasingly severe cumulative injury as well, without knowing the illness was on-going and recurring workplace injury.

Petitioner discovered June 15, 1992 a single in-building restricted pesticide application June 12, 1992 during her working hours, after which she had again become ill with the same pattern of symptoms. Over the following two weeks Petitioner, ill but trying to work part time, and became increasingly injured and then disabled. She learned after the fact she had in that two week period encountered several more unnoticed workplace exposures as she tried to return to take in and pick up work. Her doctor ordered specialized expert medical assistance with the toxic injury (Calif. Code of Reg. Title 3 § 6726, p. xxiv; Calif. Labor Code § 6409.3, p. xxiii) which the county, with instruction by their advisor (Respondent) Mr. Finn, refused to approve and which care was unobtainable without their approval.

Petitioner's doctor ordered that she could not return to that facility and could not attend any workplace or other place that had been treated with pesticide in the year prior. Petitioner, then critically ill from the series of toxic exposures and unable to work, was on sick leave. With agreement of the county and on instructions of her doctor Petitioner then took a one month medical unpaid leave ending August 10, 1992. When her doctor released her to work half time, with the strict qualification that the workplace be non toxic, the county said she would receive something. In mid September she received a form showing the county had placed her on a one year, unrequested, unpaid, and unsupported medical leave.

Over the next months Petitioner was sent billing documents showing more than a year of toxic applications discovered in the controller's records by colleagues. These records indicated many unnoticed pesticide applications in her workplace. Failure to notice restricted pesticide application is a violation of Calif. Food & Ag. Code § 12978, (p. xix), and a violation of Title 3 § 6618, Calif. Code of Regulation (p. xxiii). Furthermore they were generally done during the workday while workers were in the facility at their posts.

Then Petitioner learned by comparing these records to her time sheets that they coincided with her time off for illness, and she learned later still that these practices had been underway for the entire time she had worked for the county, explaining recurring symptoms throughout her employment.

Still later Petitioner learned the county also routinely used the recognized cancer agent, hydrazine in the air conditioning. The facility has been termed a sick building. State Health Department studies had been conducted in the year preceding these events when very high brain cancer rates in the building came to light, however the county did not disclose to the State Department of Health the toxic conditions of the building and thus the State went looking for electromagnetic waves. While a high brain cancer rate was acknowledged, with the essential information on the toxic conditions concealed, causes were not uncovered. Respondent/defendant Paul Sagers was in charge both of the pesticide application practices and the brain cancer study and thus could have made the practices known had he chosen to do so.

Prior to her last series of injuries leading to disability, an incident of exposure brought about the discovery of the toxic practices of defendant's. Petitioner had been asked to attend a meet and confer session where the subject of the use of pesticide was put forth as if it was a new proposal by management for union approval. The proposal was represented as if it were a one-of-a-kind event for a case of flees. The union side of the table rejected the use of restricted pesticides and insisted the county instead pursue the issue of steam cleaning the carpeting which had never been done in the 16 years the building had been opened. The union agreed to the use of a non-restricted growth regulator (Methoprene) and also insisted that any chemical use be properly noticed at all entrances ahead of time, MSDS's be made available as the Labor Code requires, and the application only take place when county worker's and the public were absent.

Two days later, Friday, June 12, 1992, an attendee from the union side of the meet and confer session phoned Petitioner in the afternoon to tell her she had discovered by accident the pesticide Saftotin, a restricted organophosphate would be applied that evening. Petitioner immediately contacted the union office. Her representative was not there. She then contacted the Deputy Fire Marshall. He said to stop it if she could. He suggested contacting the environmental specialist which she did immediately. The environmental specialist could think of nothing to stop the application at that late hour. Petitioner immediately contacted her

supervisors' supervisor and her Department head, neither of whom had been notified. She then went to the Chair of the Board of Supervisor's office where his Administrative assistant attempted to contact the supervisor of Doward Washington, the person who had set the events in motion. Mr. Washington had left the building for the day and his supervisor did not know who to contact to change the order. Knowing that many people worked in the facility long after the formal work hours, and off-hour public meetings were held there on a several daily basis, Petitioner went to the first floor and then to the floors which had been proposed for spraying calling out and looking quickly about to notify people they must leave. There wasn't time to cover the floors thoroughly as the facility is a large twin tower high rise complex. Petitioner then notified people on her own floor and left with minutes to spare but realized her coffee pot was on and went back inside the building to turn it off, leaving the facility with the last group from her floor barely before 6:00 PM, thinking she had avoided the toxic application,

She became ill that week end with the same symptoms she had experienced at periodic intervals over the 14 years of her work for the county, the symptoms increasing in their intensity over that time as explained in her Complaint. That Monday she still felt too ill to work but had to go in for a staff meeting and intended to return home to bed. A work order had been delivered to her from someone on the third floor where it had been found showing that the restricted pesticide Safrotin application had begun at 5:15 PM on the third floor, a floor she had walk into on the Friday before after 5:30 PM. Though they knew she was ill, she was ordered by her supervisor's supervisor not leave that Monday as many people needed her professional help, so she remained until the late afternoon growing weaker, sicker and finally noticeably wobbly and yellow. She later learned that many people on the third floor had been throwing up in the rest rooms and several had been too sick to continue working, had complained and left. She later also learned that two more incidents of spraying occurred on that Monday, one at noon, and one later that afternoon both of which were restricted pesticides, neither of which was noticed, and both of which while she was there. Another incident of unnoticed, restricted pesticide application occurred on Thursday of that week, the following mid-week and again on June 30, 1992. Each had coincided with her return to pick up and drop off work as she tried to work part time at home.

With each interval of exposure she was growing increasingly ill. Finally too ill to work at all or even barely think, her face blackened with internal bleeding, her eyes yellow, from chemical jaundice, Petitioner's doctor diagnosed pesticide illness and ordered

she not return to that workplace, and she tried to enlist expert emergency help. The county refused to allow it and the two Occupational Medicine doctors her family doctor found would not see her without county approval. She went instead to an emergency room doctor who diagnosed pesticide illness but who did not know how to help her. Thus she was unable to get the timely expert emergency treatment she required and was critically ill for the next several months and left disabled, her liver and immune system unable to handle now even the slightest exposures, and unable to eat normal food. To go about in the community at all she has to take charcoal and thus is very isolated.

Petitioner contacted the District Attorney by phone when she found that the incident Friday, June 12, 1992 was not an isolated incident or mistake but part of a long term pattern of illegal toxic applications all unnoticed, and most taking place during her working hours, and that the "meet and confer" session was carried out for show alone, concealing all the earlier applications, and without the county management side (Washington, Claus, Tokushige) having any intention of complying with their agreement. The District Attorney through the Ag. Commissioner's office asked her for a release to subpoena records of her doctors which she consented to in a sworn written statement, believing that an investigation of these activities would be carried out in good faith. A year and a half and several subpoenas later Petitioner was finally sent an incomplete, unpaginated copy of the "study" and found that the District Attorney with the help of the Agricultural Commissioner's office (Greg Wasenhove, Commissioner) produced a report investigating Petitioner herself instead of the illegal practices and the study was constructed as a device to try to defeat her Worker's Compensation claim for the June 12, 1992 incident.

While she was on temporary leave the pesticide applications continued. Notice were posted, canceled and reposted and sometimes canceled again but the applications took place anyway, and the "quarterlies" were still unposted and generally unnoticed but took place ,most during the workday.

Petitioner's original claim for damages, in compliance with the Claims Act (Calif. Gov. Code) was submitted December 8, 1991 (stamped by the Board of Supervisors stamp that day) followed by a series of amended and late claim applications and claims through February 7, 1993 with the final rejection letter by the County March 8, 1993. Application to file a late claim, and late claim were submitted because discovery of the cause had been delayed due to lack of knowledge flowing from defendant's failure to notice.

Petitioner's original complaint, including all the rejected claims was filed in Santa Clara County Superior Court Monday, June 14, 1993 (CR 1). First Amended Complaint in the record (CR 55). The Complaint named pesticide contractors, Petitioner's employer and individual and government actors with primary roles in cumulative injury and disability from repeated and continuing use of pesticides in a high rise building during Petitioner's working hours where she was both a worker, and sometimes a member of the public, these applications performed without turning off the air circulation and performed entirely without notice during the 14 years of Petitioner's employment. Illegally mixed and formulated to last in the long term, these applications were particularly hazardous. Exhibit 9 (d), shows results of urine chemical test confirming chemical injury. (CR 60 Vol. II)

Petitioner immediately reported the facts she discovered up through and laterally through official channels within her department and other appropriate departments and entities, and then to the Board of Supervisors. Learning of the overwhelming nature of the hazardous and illegal practices she reported immediately upon that knowledge to the District Attorney by phone and later filled out papers they sent to assist their "investigation." At the time the D.A. seemed to be investigating. Petitioner did not realize the misrepresentation and the need to report to the Attorney General until more than a year too late.

Petitioner's employer, Santa Clara County, constructively discharged Petitioner as a whistle blower for this reporting (Calif. Gov. Code §§ 53296-53298.5, (pp. ixx) and California Labor Code §§ 1102.5-1105, and 6312, (pp. vx-vxi)) by means of a convenient, but unlawful excuse—the disability they caused. The county and specific individual county government defendant's violated Petitioner's property rights to her job, as Petitioner had long established seniority but was constructively discharged without notice, hearing, meeting, or any due process, or any process at all, violating the California Constitution right to acquire, posses and protect property interest in job, Art. 1, Section 1 (p. x), and the United State Constitutional rights to property and due process, fourteenth amendment (p. ix). Her employer and specific individual county government defendant's who made these decisions violated the American's with Disabilities Act (p. vii-ix), and the Calif. Gov. Code § 12940 (p.xiii)—12965, refusing to discuss accommodation or provide accommodation after Petitioner had requested accommodation (a non-toxic, off-site workplace to accommodate now chemically disabled worker, accommodation they had made to others within her classification who had no disabilities but simply a

desire to work by connected computer). County defendants violated Petitioner's freedom, privacy, and due process rights to notice of application of restricted pesticides under the due process clause (Fourteenth Amendment (p. ix) of the United States Constitution as interpreted by California statutes (Calif. Civil Code 52.1 (b), p. x), and violated the California Constitution through specific enabling sections Calif. Civil Code 52.1 (b), p. x) and self executing California Constitutional rights (p. x). The County, the County Board of Supervisors, Sally Reid, County Executive, and Paul Sagers, General Services Administration and others maintained dangerous conditions of property in violation of Calif. Gov. Code § 835 (xii).

The original complaint named several individuals with specific deliberate, deceptive, and malicious acts which resulted in acute chemical injury to Petitioner, and specific individuals with deliberate cover-up and malicious acts by withholding desperately needed, prescribed, emergency medical care for acute pesticide injuries in violation of the Labor Code (§ 6409.3. p. vxii) and regulations (Title 3 § 6726, p. vxiii) requiring such care. The complaint cited failed affirmative duty to notice (Proposition 65) and through (Food § Ag, Code § 12978, p. ivx, and Labor Code § 6408, p. vxii), as well as personal injury through evidence of negligence for failing to carry out mandatory duty to notice and exclude from hazard under the Labor Code and Food & Agriculture Code and regulations. Petitioner requested actual damages, injunctive relief, including reinstatement, and punitive damages.

1. HISTORY IN THE DISTRICT COURT

County government, individual county employee and contract employee wrongdoers [county defendant's], and their contractors [corporate defendants], removed this state complaint flowing from toxic cumulative injury—deliberately unnoticed, discrimination, and cover-up to federal court because it contained Americans with Disabilities Act, and 42 U.S.C.S. § 1983 (p. vii) based constitutional causes of action within the context of the state complaint.

Upon County defendant's F.R.C.P. Rule 12 (b), (e) and (f) motions, members of the Board of Supervisors were dismissed (Calif. Gov. Code § 820.9 (p. xii) immunity) from charges of pesticide misuse, contract violations, claims under 42 U.S.C.S 1983 (p. ix), and as proprietary operators of dangerous condition of property. Calif. Gov. Code § 835 (p. xii).

Individual county employees were dismissed (Calif. Gov. Code § 820.2, governmental employee immunity, p. xii) from all causes including: liability for specific individual intentional bad faith acts including those in direct and surreptitious violation of specific agreements; for specific California Constitutional violations; for denial of expert emergency care to a critically injured worker whose doctor has prescribed such expert emergency care; for intentional spoliation and deliberate withholding of evidence in Workers Compensation action by withholding care; and for deliberate spoliation and deliberate withholding of evidence in action against pesticide contractors.

Ruling preemption of Worker's Compensation, the County and Board of Supervisors were dismissed by the district court from the following causes: personal injury and disability through intentional sweeping violation of statutes; negligence per se—ultra hazardous activity; willful creation of dangerous condition of property, negligence, failure to warn as tort; serious and willful misconduct; and violation of Calif. Constitutional promises concerning privacy and freedom, safety, life and health (Art. 1, Section 1, p. xiii).

Determining that plaintiff had not cited a federal statute or [federal] constitutional provision that protects [California] Constitutional rights, and asserting constitutional deprivation must be "under color of state law" the district court dismissed these causes overlooking that these causes of action were brought under the California Constitution which does not require that they be "under color of state law" (Calif. Civil Code § 52.1 (a) and (b), p. xiii) and they were conducted and covered up under the authority of county government.

The district court did not address the *California* Constitutional causes of action brought under Calif. Civil Code § 52.1. The U. S. Appeals Court also did not address the California Constitutional causes of action under the Calif. Civil Code § 52.1, p. xiii.

Ruling that the fraudulent concealment exception could not be pled as it requires a showing of employers actual knowledge of Petitioner's injuries, the district court ruled that the fraudulent concealment exception applied only to employers concealment of knowledge of injuries, not to other acts such as fraudulently concealing toxic applications and fraudulently concealing the relationship of these applications to the known very high cancer rate in the facility. This district court's test is without fact development. As to county Defendant's, no window allowing depositions has opened in the whole time this case has been in the courts. Until

County Defendant's are deposed there is no way to answer what they knew and when they knew it. It is an unfair burden to make a plaintiff accountable for what defendant's knew and when they knew it without allowing discovery.

The court below ruled that Proposition 65, the California voter sponsored and passed initiative requiring disclosure of the use of toxic substances does not apply to a county's use of pesticides (in spite of Gov. Code § 862 (b), p. xi).

The district court dismissed punitive damages (in overlooking Calif. Gov. Code § 862 (b), p. xi, Calif. Gov. Code § 53298,5. (b), p. ivx, Calif. Food & Ag. Code § 14003, p. vx, and Calif. Labor Code § 1105, p. vxi) .

The district court also ruled that Defendant county pesticide contractor Applied Pest Management, Inc. and Gregory Clark, were not subject to 42 U.S.C.S § 1983 as private parties, and dismissed these defendant's from Constitutional causes of action.

Petitioner was permitted to restate causes thirteen (whistle-blower), fourteen (ADA, and State disability discrimination act) and add her right to sue letters from the California Dept. of Fair Employment & Housing and from the Justice Department (EEOC) (Excerpt of record, Volume III, Ex 20, 21 and 22 and CR 55 appended to the First Amended Complaint). Reading plaintiff's thirteenth and fourteenth claims as if they were both ADA claims (they were not) the court below dismissed both as accruing before the effective date of the act due to Petitioner's initial absence for illness before the effective date saying that Petitioner's absence for illness started the American's with Disabilities clock [rather than at some time connected with her employer's response to her requests for accommodation or with her defacto termination].

The district court inexplicably determined respondent Finn to be to be petitioner's advisor (though he was the county's advisor at the time of his acts) and the district court determined in his role as Petitioner's advisor he was immune from suit for denial of emergency medical care as prescribed by Petitioner's doctor for acute toxic injury, acts that took place before there was any action in any court.

Corporate defendants, Instar Pest Consultant's filed a motion which was converted to summary judgment motion based on timing as they were a county contractor more than a year before Petitioner filed and summary judgment awarded to them by the district court.

The district court judgment appealed from as to the county and county defendant's included the order January 18, 1994, Appendix 4, dismissing individual government defendants and dismissing certain causes of action and the order June 27, 1994, Appendix 5 dismissing all other causes as to County defendants and Finn (but not as to Applied Pest Management, Inc. or Gregory Clark. The date of entry of final Judgment, all parties: September 19, 1994, Appendix 5. The date of filing appeal to the U. S. Court of Appeals for the Ninth Circuit: October 17, 1994.

2. HISTORY IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

After case 94-16063 (Instar Pest Consultant's, Inc., corporate defendant) was fully briefed it was consolidated with 94-16824, the County, county defendant's, Applied Pest Management and Gregory Clark case, by the U.S. Court of Appeals for the Ninth Circuit for hearing.

Petitioner, now retired on very small disability pension, was graciously assigned a pro bono attorney by appointment of the Appeals Court, Mr. Christopher Hunter, who filed a Supplemental Opening Brief as to both pesticide contractors and Gregory Clark, contractor's agent on behalf of Plaintiff but did not address the county or county defendant's.

This court provided leave to plaintiff/petitioner, pro se to file an additional Supplemental Brief as to county defendants and Mr. Finn.

The appeals court issued its Memorandum, filed October 26, 1995, affirming in part and reversing in part. The pesticide contractors with Gregory Clark were reinstated as defendants. Instar Pest Consultant's, Inc. were reinstated. The County and County defendants were not reinstated, the subject of this appeal. Petition for Rehearing was filed December 1, 1995.

This Petition for Writ of Certiorari requests the Supreme Court review issues with respect to the County and County defendant's in case 94-16824, as set forth on page i.

I. INTRODUCTION

1. OUTLINE OF ISSUES PRESENTED FOR CONSIDERATION BY THE SUPREME COURT

a. CONFLICTING CASES MAY INFLUENCE HOLDINGS IN THIS CASE:

1) New Cases address effective dates of coverage of the American's with Disabilities Act (ADA). These cases hold that coverage of the ADA hinges on the date of official notice of termination by the employer. They are in conflict with the Memorandum in this case.

2) New cases address the Due Process Clause, Constitutional Property rights, and Constitutional liberty interests, and conflict with holding in this case.

3) New cases address Governmental employee immunity and conflict with the holding in this case.

4) The Ninth Circuit decided another case under whistle blower statutes the same day the Memorandum in this case failed to recognize whistle blower causes of action.

5) Recent cases further expand wrongful termination where an employer's conduct contravenes fundamental public policy against discrimination, as here.

2. FUNDAMENTAL STATE ISSUES IN THE REMOVED COMPLAINT WERE NOT ADDRESSED IN THE MEMORANDUM OF THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT:

a. California Government Code §§ 12900-12996 cause of action.

b. California Government Code §§ 53296—53298.5 cause of action,

b. California Constitutional causes of action.

d. Exceptions to the Worker's Compensation system remedies

3. FACTS IN THE RECORD AND KEY STATUTES MAY HAVE BEEN OVERLOOKED:

a. Evidence of Compliance with Claims Act was apparently overlooked.

b. Overlooked California statute allows union member to represent herself and thus she has standing with respect to asserting right to job.

c. Disability from defendant's acts and negligence, coupled with defendant's tort of repeated trespass should confer standing to request injunctive relief against future trespass.

4. THE TAKING OF PETITIONER'S JOB UNDER THE CIRCUMSTANCES IS AGAINST FUNDAMENTAL PUBLIC POLICY. THE WORKER'S COMPENSATION SYSTEM DOES NOT HAVE AUTHORITY TO COMPENSATE FOR PETITIONER'S JOB LOSS OR WAGE LOSS, ONLY FOR A DISABILITY DEFICIT. SPECIFIC OVERLOOKED CODE SECTIONS ALLOW FOR RECOVERY OF WAGES AND RESTORATION OF JOB RIGHTS. IF THE COUNTY IS DISMISSED FROM ALL CAUSES OF ACTION, THERE IS NO TRUE REMEDY FOR PETITIONER.

5. SUMMARY OF ARGUMENT

Causes of action for whistle-blowing discrimination, disability discrimination, California Constitutional violations, and wrongful defacto discharge should be reviewed as they conflict with cases from other appellate districts. California statutes were overlooked in the U. S. Court of Appeals Memorandum. The loss of Petitioner's job under these adverse circumstances of this case is against fundamental public policy. Petitioner met her filing requirements and deadlines and stated her causes of action and should have a means to be made whole as to the county and county defendant's. Without a way to achieve restoration of County Defendant's, the losses County Defendant's caused including the loss of Petitioner's employment, wages and benefits unfairly stand without recourse. This outcome is against established public policy and against all fairness, and should and can be reversed.

J. ARGUMENT

1. ACCRUAL OF CAUSE OF ACTION UNDER AMERICAN'S WITH DISABILITIES ACT WAS DETERMINED BY THE WRONG TEST—DATE OF ONSET OF DISABILITY. THIS INCORRECT TEST IS IN CONFLICT WITH THE ACT, WITH THE PURPOSES OF THE ACT, AND IN CONFLICT WITH NEWLY DEVELOPING FEDERAL APPELLATE CASE LAW.

a. There is no case unless and until there is a "qualified person with a disability." (ADA , 42 U.S.C.S. §§ 12111 (8), and 12131 (2) (pp. xi, xii)

In this case, Petitioner was not a "qualified person with a disability" (able to resume work) until her doctor released her for half time work August 10, 1992, when she made her first request for accommodation. This was after the last sections of the ADA took effect, the portions covering all employers—July 26, 1992 (p. vii-viii). The act took effect for public agencies six months earlier on January 26, 1992 (p. viii, ix). Thus for the purposes of the ADA claims, all Respondents' acts of discrimination took place after the act was fully in effect.

b. There is no case unless and until a request for accommodation is made. There is no case unless the employer responds to requests for accommodation with discriminatory acts.

Petitioner requested accommodation in the first instance August 10, 1992 (CR 55, p. 23). This request was met by her employer with a mailed form dated September 9, 1992 declaring she had been placed on a one year (unrequested), unpaid leave (CR 55, p. 23-24). As the end of this leave approached Petitioner requested, through her union, to meet and confer to discuss accommodation for her return to work. The county refused to meet and confer (CR 55, p. 24) resulting in defacto dismissal.

c. Accrual of a claim under the ADA follows realized damages (losses from discrimination). These are factual questions.

Accrued losses under the ADA in this case depends upon a finding of the timing, nature and extent of Petitioner's exclusion from work, and a finding of her ability to work. The tests would in most cases require personal testimony, some require expert opinion, and some require examination of records. These are factual tests. For example, as there was no hearing or notice of termination, when did defacto termination occur in this case? Was it at the beginning of plaintiff/petitioner's paid sick leave (the time determined in the courts below)? Or was defacto termination at one of the following later times: 1) at the time Petitioner went off paid sick leave following her disabling injuries and onto the month of requested, approved, unpaid, sick leave, 2) at the start, or at the anniversary of the year of unpaid, unrequested medical leave, 3) at the end of the year of unpaid leave, at the time of first refusal, or at the time of last refusal to meet and confer to determine accommodation necessary for Petitioner to resume work, 4) at the beginning date of Petitioner's

disability retirement, retirement made necessary by loss of salary, 5) at the actual date of the last paycheck more than a year after the initial failure to accommodate, or 6) or was defacto termination at the beginning of disability retirement?

The tests of discrimination on the part of the employer involves factual questions such as the reasonableness of the requested accommodation and the reasonableness of the response to request for accommodation. In this case the test of discrimination also involves factual questions such as the rational for keeping the office workplace in a continually toxic state, the allowance of others without disability to work off-site by connected computer, and the timing, nature and extent of employer's response if any.

A cause of action ripens when there is damage, and if more than one instance of damage, at some point along the trail of damage. Claims under the American's with Disabilities Act (ADA) 42 U.S.C.S § 12111-12131 et. seq. ripen at some point when discriminatory acts taken in violation of the act, or obligations under the act not taken, result in losses of a job, wages, benefits or other losses.

d. Recent Cases in the Second Circuit Address Effective Dates of the ADA, Coverage of the ADA, and Whether Coverage is a Question of Law or Fact.

Smith v. United Parcel Service of America, Inc. 65 F.3d 266 (2nd Cir. September 8, 1995) is in conflict with the ruling in this case.

The Appellate Court's Memorandum states: "The District court found that Jensen could not file a claim under the American's with Disabilities Act, 42 U.S.C.S. §§ 12101—12213, ("ADA") because the ADA, which is not retroactive, took effect on July 26, 1992, and Jensen stopped work on July 1, 1992. . . . Jensen stopped work prior to the ADA's effective date. Thus, we affirm the district court's finding."

The Second Circuit addressed this issue directly September 8, 1995 in a case published days before this ruling. "Limitations period for bringing claim under Americans with Disabilities Act begins to run on date employee receives definite notice of termination representing employer's official position." *Id.* (Emphasis added.) Thus, effective notice of termination is required to begin the tolling period. No such employer notice is found in the record of Jensen v. Santa Clara County as there was none.

The Second Circuit also addressed whether effective dates and coverage of the Act are questions of law or fact: "Fact question as to whether employer's statements to employee constituted definite notice of termination representing employer's official position, as would commence running of limitations period for American's with Disabilities Act claims, precluding summary judgment." *Id.* In *Smith* (1) the acts of the employer and thus coverage of the ADA, and (2) establishing fact of date of notice of termination is for a jury.

The employee Smith was disabled from 1988, alleged non accommodation by his employer from that time forward, and was eventually terminated. His last day of work was May 27, 1992, before the ADA went into effect for private employers. Coverage of the Act hinged on date of actual, official notice of termination, not date of onset of disability or last date present at work. Summary judgment in favor of his employer was vacated and the case remanded for a jury trial by the Second Circuit, setting precedent on the above issues.

In Jensen v. Santa Clara County, Jensen's last day was June 30, 1992 but she did not know this was to be her last day. Instead she was given one month requested unpaid medical leave and then put on a year's unpaid and unrequested medical leave. The county refused to meet & confer at the approaching end of the leave. No letter of termination was ever received. Almost a year and a half later, Petitioner had to retire on disability in order to establish a small income. She received her final check (with a year's gap in pay) almost a year and a half after her last work day. (Excerpt of Record, Vol.I, Ex. 6, pp 22-24 (CR 55)) Here all defendant's discriminatory acts which fall within the scope of the ADA, the one year unrequested and unpaid medical leave, the outright refusal to meet and confer, and the defacto termination took place after the effective date of the ADA for public agencies (Jan. 26, 1992) and for employers in general (July 26, 1992). The ADA does not provide remedy for the workplace injury and disability itself, only for discrimination on the part of the employer after disability.

The U.S. Court of Appeals Court memorandum cited *Burfield v. Brown, Moore, Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). This case too hinges on determination of the date of actual notice of dismissal. Thus both cases here cited, though decided differently on the facts, determined coverage of the ADA from the actual notice of termination.

e. Due Process is Required Before Termination.

Without meet and confer process, hearing of any kind, or notice Petitioner was terminated. "Where protected interests in public employment are at stake, predetermination hearing is required by due process clause . . . ." *Cronin v. Town of Amesbury*, U.S.C.S. Constitutional Amendment 14. 895 F.Supp. 375, 376, July 25, 1995. "Due Process Clause requires that public employee's post term hearing be held at a meaningful time." U.S.C.S. Const. Amend. 14. *Cronin, Op Cite at* 376.

f. It is an Abuse of Discretion for a Judge to Assuming the Fact Finding Role of the EEOC in the First Instance and the Jury and the Last.

When Congress has set up a particular administrative process preliminary to the court process, as in the case of the American's with Disabilities Act, and the agency assigned, the EEOC in this case, has been assigned a specific fact finding role and has found elements of discrimination, defacto termination, and timeliness, and has issued a right to sue letter following their investigation, can a federal judge, who has not conducted an investigation and himself is not assigned a fact finding role, rule "failure to state a claim" on timeliness, as here?

In summary, as to the ADA causes of action in Jensen v. Santa Clara County there was no pre or post termination hearing or notice. The County's discriminatory acts, refusal to meet and confer, refusal to discuss accommodation, the defacto taking of Petitioner's job, all fell within the effective date of the Act. The EEOC Right to Sue Letter (Excerpt of Record, Vol. III, Ex. 21 (CR 55)) presents a new deadline. This deadline was met with the filing of the First Amended Complaint February 24, 1994 (Excerpt of Record, Vol. 1, Ex. 6, CR 55.) Thus Petitioner requests the Court rehear and reverse the ADA ruling in accord with *Smith*, Op. Cite, *Cronin*, Op. Cite, and Badih, Op. Cite., and the Appellate court's own citation, *Burfield v. Brown, Moore, Flint, Inc.*, Op. Cite, (on principle).

2. It is an Abuse of Discretion to Overlook the Claims Made Under the Statutes and California Established Policies for A Removed Case.

a. An action for wages is allowed in California, as is a tort action for loss of employment wnen the loss contravenes established fundamental public policy.

In California "[a]n employee is entitled to maintain such a tort action [or employment contract action] "where an employer's discharge of [the] employee contravenes the dictates of fundamental public policy. [Citations]" *Badih v. Myers*, Cal.Rptr.2d 229, 231 (Cal.App. 1 Dist. July 20, 1995), building on *Rojo v. Kliger* (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373. Fundamental public policy is clearly established by the American's with Disabilities Act, 42 U.S.C.S § 12101, purpose (p. xi), and the similar state Gov. Code §§ 12940, (p. xvii), prohibiting employment discrimination against disabled persons. Fundamental public policy is clearly established to protect whistle blowing activity by Calif. Government Code § 53296-53298.5, Calif. Labor Code §§ 1102.5-1105, and 6310.

Employer may be held liable in tort for terminating an otherwise "at will" employee if the termination violates public policy, since otherwise the threat of discharge could be used to coerce wrongdoing, or taking other action harmful to the public weal; . . . *Nagy v. Whittlesey Automotive Group* (1995 Cal App 4th Dist.) 47 Cal.Rptr.2d 395.

b. Petitioner's right to proceed under California Government Code § 12940 cause of action was not addressed in the memorandum or order of either court below.

As to the state discrimination claims, Calif. Gov. Code § 12940 (p. xvii) was in full effect at all times during the discrimination of the county. The Calif. Department of Fair Employment and Housing issued a right-to-sue letter dated January 26, 1994. The First Amended Complaint is dated February 24, 1994.

This State act was in effect and covers discrimination for disability before the ADA came into effect. It contains a one year statute with allowance for additional time up to three months when needed. Petitioner's complaint relating to discrimination by defacto termination for disability, and all processes and filing deadlines were met in the first Amended Complaint. Remedies under this section are non exclusive remedies. The right to proceed under these sections is a right of all Californians who have experienced such discrimination (except here).

3. CONSTITUTIONAL CAUSES OF ACTION:

When government and governmental actors step outside of their proper role and instead violate the very statutes they have responsibility to enforce, and where these violations cause Petitioner

damaging loss of personal bodily privacy, and where these violations cause loss of the right to defend life and liberty and obtain safety, California Constitutional rights are properly alleged whether or not federal statutes and the federal constitution are cited as well or separately. California Constitutional rights and U. S. Constitutional rights under the California Civil Code § 52.1 (b)

a. Immunity statutes and Worker's Compensation may not bar action under Civil Code § 52.1, this act a newer, separate, and specific remedy.

Where county government and certain employees are responsible to protect persons from the unnoticed exposure to toxic substances by enforcement of notice and duty to care in the use of toxic substances, these requirements firmly part of the Calif. Food & Agriculture Code §§ 12977, 12978, 12982, 12985, 12991, 14002, 14003, 14011, (p. xix-xxi), Labor Code §§ 6400-6408 (p. xxiii), and Calif. Code of Regulations, Title 3 § 6618, p. xxiii, and where these county defendants/respondents instead concealed their actions and caused illegally mixed toxic substances to be applied without notice in the workplace and public building during working hours, injuring workers including petitioner, and where, after county defendants knowingly made persons ill, they then stepped up their reckless and negligent applications on the same day persons were injured, known to be injured, and they continued these unnoticed, negligent acts for another two weeks, in violation of duty to care and duty to enforce those same statutes, and in violation of an explicit meet and confer bargain, and where Petitioner's is disabled by these acts, Petitioner's constitutional rights were violated.

These facts are set forth in Plaintiff's Complaint and First Amended Complaint,. California self executing Constitutional sections are stated. Acts in violation of these sections are stated, and implementing California Civil Code Sections are stated in Petitioner's Complaint.

Petitioner stated a cause of action for violations of the State Constitutional right to physical privacy and the Constitutional right to protect her health through the California Constitution and California Civil Code § 52.1. "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."--Article 1, § 24, California Constitution (p. xiii).

The unnoticed and deliberate use of substances which have been declared by the State of California to be chemicals little

understood but suspected to be extremely hazardous to people and listed for that reason in the Calif. Code of Regulations, Title 3 § 6198.5, as here, is nothing short of chemical experimentation of unwitting people, and reckless endangerment. The chemicals that were routinely used are found on this list. They are breathed in and absorbed through the skin and be cannot be fully removed nor their effects be avoided by a person in a workplace setting. This is an insidious coercive invasion of privacy, as insidious as surreptitious drugging of any other type.

There is overriding public purpose in protecting the privacy of one's body from another's broadcast use of toxic substances--an overriding public purpose in upholding a privacy right to not be placed in a position where the body will unknowingly absorb toxins. California statutes and regulations are intended to provide protection for this very interest. However when public agencies themselves, who have obligations to uphold this interest are themselves deliberately violating the statutes and regulations and surreptitiously causing exposure to restricted toxins, and endangering the life and health of employees and the public in the process, Constitutional causes of action should be a recourse.

"The right of privacy is expressly protected under Cal. Const., art I § 1. *In re Duncan* (1987, 2nd Dist.) 189 Cal.App.3d 1348, 234 Cal.Rptr 877. Statutory provisions limiting Medi-Cal funding for abortions undermine the right of privacy guaranteed under Cal. Const., art I § 1, in that they threaten not only a woman's interests in life, health, and personal bodily autonomy, but also her right to decide for herself whether to parent a child. *Committee to Defend Reproductive Rights v. Myers* (1981) 29 C3d 252, 172 Cal.Rptr 866, 625 P.2d 779, 20 ALR4th 1118. Thus California Constitutional privacy involves both the physical "self" (physical autonomy) and the autonomy of personal choice in the status and risk taking of the body. With surreptitious toxic application those choices are not available and physical autonomy is taken.

b. California Constitutional causes of action were not addressed by either court below. The language of the Cause of Action titles and text of the complaint was overlooked,—an abuse of judicial discretion.

The Appeals Court's Memorandum: "The district court correctly determined that Jensen has not cited to any constitutional or statutory provision which has been violated. Her claimed freedoms to eat, work, read, embrace one's children, and be free from puzzling illness, while desirable, are not protected by any federal statutory or

constitutional provisions." Jensen v. Santa Clara County, Memorandum at 5. (Emphasis added) Jensen claimed through California State Constitution and California statutes that clearly set forth the right of Californians to privacy, liberty, substantive due process, freedom not to be foreclosed from work (liberty rights), earned seniority in her work (property rights), actual freedom from coercive invasion of her body by toxic substances (freedom and privacy), Excerpt of Record, Ex. 6, pp 18-20, CR 55, and CR 1, Complaint and First Amended Complaint.

c. California Civil Code § 52.1(b) is intended to ensure these rights, separate and apart from all other statutes and claims.

This case was filed in state court and removed by defendant's. The Court of Appeal's Memorandum does not address the California Constitutional rights taken. Thus Plaintiff requests the Supreme Court review and address the obligation of the federal court in a removed case to either address state constitutional issues or to return the state issues to state court.

If the federal court does not recognize the California Constitution or statutes defendant's can, with a single act of removal to federal court, take away the California Constitutional rights of a plaintiff, who dares to assert a federal cause of action. The U.S. Constitution Article III, conferring the powers on the federal courts, does not give such broad and sweeping power to nullify state constitutions and laws to federal courts.

If the federal court system wished to ignore a state's Constitution and laws, the federal court should have returned the case to the state forum in which it had been filed, or at least returned those parts which arise from state Constitution and acts.

d. Cases in conflict with this decision set forth Due Process Fourteenth Amendment Rights in Employment.

Petitioner was ordered by the district court to remove federal constitutional causes from her original Complaint. This removal is not in accord with new cases. New case law directly addresses Due Process rights under the Fourteenth Amendment: "Due process clause requires that public employee's post termination hearing be held at a meaningful time." *Cronin*, Op. Cite., 376. In Jensen v. Santa Clara County there was no post termination hearing. There is a Due Process Fourteenth Amendment right implicated in the taking of a person's job without hearing, and a right to "work" at one's job, at the least a Due Process right not to have one's job taken without

notice, hearing, or just cause, *Id. Cotnour v. University of Me. Sys.* (1994, CA 1 Me) 35 F 3d 6 reiterates the right to an explanation of the evidence against a tenured professor and a right to a termination hearing.

e. Constitutional property rights in one's job arise in various ways and in this case there is a property interest arising from civil service seniority.

There is a "protected property interest" in one's job and it's taking without hearing or cause, *Cronin, Id.* "First, because he can only be dismissed for just cause pursuant to Mass.Gen.L ch.31 § 41, Cronin has a protected property interest in continued employment." *Cronin,* Op. Cite., 383, citing *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972). Just as Cronin had a protected property interest in his employment (requiring due process protection), Jensen had seniority in her civil service job and thus a property interest requiring due process protection. Property rights are protected under 42 USCS § 1983 and § 1343 (3) and can be redressed by suit. *Hofferber v. First Nat. Bank* (1977, WD Okla) 437 FSupp 788.

f. Where a governmental employer disables a worker by a long series of surreptitious wrongful acts, and then terminates the worker who has been made otherwise unemployable by imposed uninsurability and imposed physical limitations, constitutional liberty interest is infringed.

"[G]overnment employee's liberty interest would be implicated if he were dismissed based on charges that imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Cronin,* Op. Cite, 383, citing *Roth,* 408 U.S. at 573, 92 S.Ct. at 2707. This is exactly the case here. Jensen was dismissed, defacto, and her physical limitations, illegally imposed on her by County defendant's through their Due Process deliberate due process violations (statutory notice violations), foreclose Petitioner's freedom to take advantage of other employment opportunities as she is virtually uninsurable and now unable to undergo a daily risk of exposure. Liberty interest is a federal and state constitutional issue, and was set forth in Plaintiff's complaint (through 42 U.S.C A. §1983). (CR 1, and Excerpt of Record, Vol. II, Ex. 20, pp 18-20, CR 55.) See pp. xii for the development of liberty and freedom rights starting with the Declaration of Independence, the Preamble to the Constitution, and assured by the fifth, fourteenth amendments and woven as a dominant thread through the whole of the amendments.

4. CALIFORNIA GOVERNMENTAL EMPLOYEE IMMUNITY IS A QUALIFIED IMMUNITY AND DOES NOT PROTECT GOVERNMENTAL EMPLOYEES WHO KNOWINGLY BREAK THE LAW, THOSE WHO VIOLATE THE CALIF. CONSTITUTION, THOSE WHO COMMIT TORTS, AND IT DOES NOT PROTECT EMPLOYEES WITH IMMUNITY WHERE THE GOVERNMENTAL AGENCY ITSELF IS NOT IMMUNE.

a. Cases Addressing Parameters of Governmental Employee Immunity Conflict with the Determinations of the Courts Below.

The Memorandum of the U. S. Court of Appeals for the Ninth Circuit: "The eight named public employees are immune from liability for actions taken within the scope of their employment," citing Government Code § 820.9. (p. xvi)

"Qualified immunity protects all government officials but the plainly incompetent or those who knowingly violated law or those who act where law clearly proscribed the actions taken." *Cronin v. Town of Amesbury*, 895 F.Supp 375, 377. (Emphasis added.) Petitioner pled violations of California laws Food & Ag. Code § 12978, and 14011 (p. xix-xxi), Labor Code §§ 1105, and 6310 (p. xxi), Gov. Code § 862 (p. xvi) which clearly places pesticide misuse outside of the protection of Gov. Code § 820.9 and § 12940, for which there is no governmental immunity, and the American's with Disabilities Act, 42 U.S.C.S. 1201-12133, (p. xi), for which there is no state or local governmental immunity—statutes deliberately, repeatedly violated by County defendant's. She pled specific and repeated actions of County defendant's clearly proscribed by law. She pled violations of her Fourteenth Amendment due process right over 14 years to receive actual and constructive notice of exposure to hazardous substances from defendants. She pled that when she (and other employees) became ill from these activities certain county defendant's (Washington, Tokushigi, Claus), instead of ceasing them, deliberately stepped them up. She pled when emergency medical treatment was medically prescribed, instead of providing it according to code and Regulation, it was withheld (defendants Finn and Elizondo). (See Complaint, Excerpt of Record, Ex . 6, p. 27 (CR 55).)

Unlike *Cronin, Op. Cite.* where Cronin had some role in the action against him, Jensen had no role. She was repeatedly unknowingly placed in harms way due to absence of notice—Due Process violations of law and Constitutional protections. (Excerpt of Record, Ex. 6, CR 55). The protection of law was denied Plaintiff by

the very Government and Government employees in charge of enforcement of the law (Wasenhove, Santa Clara Board of Supervisors, and supervisors McKenna, Lofgren, Gonzales, Diridon, Honda). Administrative remedies and assistance by agencies set up to enforce the laws relating to toxic substances could not be enlisted until knowledge of the illegal activities was discovered, long after it was too late. Petitioner, who tried and thought she had carried out her responsibilities for reporting, instead became the subject of a District Attorney investigation for reporting violations. (Excerpt of Record Ex. 6, p. 22-24, CR 55.) Defendants/Respondents clearly fall under *Cronin*, Op. Cite., and within the exception of Calif. Gov. Code § 820.8 (p. xvi) and thus should not be immune. Plaintiff requests the Supreme Court consider the lower courts' immunity findings in light of *Cronin*, Op. Cite.

b. Statutory Exceptions to Public Agency Immunity

Governmental immunity for dangerous conditions of property is provided by statute and exceptions to immunity are also by statute (Calif. Gov. Code § 835) (p. xvi). Calif. Gov. Code § 862 (b) (p. xvi) specifies no governmental immunity for a public entities use of pesticides: "*A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person . . .*" [Emphasis added] The Law Revision Commission Comment thereon (West): "(S)ubdivision (b) makes clear that the standard of liability applicable to private persons applies equally to the public entities." It is straight forward. Public entities are not immune under Calif. Government Code § 815 (p. xvi) for the elements of petitioner's complaint that involve pesticide misuse, noticing, and responsibilities following or resulting from pesticide use. If the entities themselves are not immune can the employees responsible be immune?

Furthermore Calif. Gov. Code § 815.6 (p. xvi) provides that where a public entity is under mandatory duty by an enactment to protect against particular types of injury (as here), it is liable for failure to discharge this mandatory duty. Section 815.6 "takes precedence over Calif. Gov. Code § 818.4 providing immunity for discretionary acts as distinguished from ministerial acts or non discretionary acts." *Caplis v. Monterey County* (1979) 158 Cal.Rptr. 395, 97 C.A.3d 249. Whether a condition is dangerous and whether the failure to warn of the danger is proximate cause of injury

are primarily questions of fact. *Buchanan v. City of Newport Beach* (1975) 123 Cal.Rptr. 338, 50 C.A.3d 221.

As there is liability for taking plaintiff's job, "Doctrine of governmental immunity for misrepresentation does not apply to contract action. *Lundeen Coating Corp. v. Department of Water and Power of City of Los Angeles* (App.2 Dist.1991) 283 Cal.Rptr. 551, 232 Cal.App.3d 816, rehearing denied, review denied."

c. Members of the Board of Supervisors and other county defendants are not exempt from liability for their acts.

Calif. Gov. Code § 835 provides public entities and employees are liable for wrongful acts or omissions in creating dangerous conditions of public property.

Board of Supervisors and individual Board defendants were not sued vicariously. They were named for specific acts and omission--setting instances of unnoticed toxic use in motion (Tokushige, Washington, Claus, Sagers, the Board of Supervisors, Reid); and for approving a panoply of illegal acts including but not limited to fraudulent concealment of toxic conditions and the damages toxic conditions were causing county workers as a whole (Sagers, Reid, Does); employment discrimination against worker injured by the hazardous conditions who blew the whistle on the hazardous conditions (Board of Supervisors, supervisors McKenna, Lofgren, Gonzales, Diridon, Honda, Co. Exec. Reid, Dept. Head Franklin); defacto termination of disabled worker (the County, Reid, Franklin, Does), failure to take timely corrective actions after notice of injuries (County Board of Supervisors, supervisors McKenna, Lofgren, Gonzales, Diridon, Honda, Co. Exec. Reid, Ag. Commissioner Wasenhove, G.S.A's Sagers, Tokushige, Washington, Claus); constitutional violations (the County, County Board of Supervisors, supervisors McKenna, Lofgren, Gonzales, Diridon, Honda, Co. Exec. Reid, G.S.A's Sagers, Tokushige, Washington, Claus), and other specific wrongs and omissions as spelled out in depth and particulars in Petitioner's complaint.

Certain county defendants were named as indispensable parties (Franklin, Department head; Reid, Co. Exec.) in the employment discrimination for disability causes of action.

The nature of the decisions by named county employees and Board members, how to conduct maintenance of county facilities, whether to adhere to the requirements of the state Constitution, statute, code, and contract in treatment of an employee, are ministerial, not discretionary, and thus are not exempt under Calif. Gov. Code § 820.2 (p. xvi) which exempts only discretionary decisions. Furthermore acts whether supervisory, oversight, or the acts themselves which violate the constitution, statute or regulation, as here, cannot be termed discretionary or within the scope of public employment for the purposes of Calif. Gov. Code § 820.2 as violation of the Constitution, statutes or regulations is never a discretionary act and no public employee is hired to break the law or violate constitutional rights, indeed they take an oath not to do so. Thus neither code sections cited (Calif. Gov. Code § 820.2 or 822.2) confer no immunity to county defendants.

Calif. Gov. Code § 862 (b) provides: "*A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person . . .*" [Emphasis added]. Individual public officials and employees are as accountable as if they were privately employed individuals, for injuries caused by their use of pesticides under this section. This section post dates the Governmental immunity sections.

Immunity of employees is tied to and depends upon public immunity. Where agencies themselves are not immune through Calif. Gov. Code § 862 (b) employees are also not immune.

5. STATE WHISTLE BLOWER CAUSES OF ACTION WERE NOT ADDRESSED BY THE COURTS BELOW.

a. The Memorandum of the Ninth Circuit Did Not Address Whistle blower California Labor Code § 1102.5 et seq. (p. xxi) Causes of Action or Government Code §§ 53296-53298.5 (b) (p. xvii) Whistle blower Causes of Action.

b. There is an apparent conflict within the U. S. Court of Appeals for the Ninth Circuit on the principles of this case.

On the same day this case decision was filed, the Ninth Circuit determined in an action for retaliatory discharge, that whistle blowing activities by public employees involved issues of material fact. *Clements V. Airport Authority of Washoe County,* U.S.C.S. 9th, No. 93-16693, October 26, 1995, by Reinhardt, J. In that case there had been a grievance procedure and an administrative hearing in which there was testimony and a ruling for plaintiff's. The ruling was appealed to the district court. The district court granted summary judgment to defendant's. On the facts, the U. S. Court of Appeals for the Ninth Circuit recognized whistle blowing complaint as fact based and ruled the action for whistle blowing could go forward.

The California Supreme Court has not only recognized whistle blowing actions but has held that discrimination against whistle blowing employees is contrary to public policy. *Sanchez v. Unemployment Ins. Appr. Bd.* (1984) 36 Cal.3d 575, 588, 205 Cal.Rptr. 501, 685 P.2d 61 (Labor Code §§ 1102.5 (a) & (b) (p. xxi). Even where the requirements of the whistle blowing statute are not met to the letter, the California courts have considered these defacto retaliatory termination cases as tort, common law and contract actions according to their facts and pleadings because of the important public policy issues.

The California Labor Code § 1105 allows action for damages in whistle blowing cases: "Employee's action for damages Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered in violation of this chapter." Both of the Courts below have declined to address whistle blowing Cause of Action.

c. New Cases, including those against public agencies, allow a tort action even without exact coverage of whistle blower statutes, but here an employer's actions contravene fundamental public policy with no recourse.

An employee is entitled to maintain such a tort action "where an employer's discharge of [the] employee contravenes the dictates of fundamental public policy. [Citations]" *Badih v. Myers*, Cal.Rptr.2d 229, 231 (Cal.App. 1 Dist. July 20, 1995), citing *Rojo v. Klinger* (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373. Public policy is established in the California Codes--Calif. Labor Code § 1102.5 et. seq. and Gov. Code §§ 53296-53298.5 (b) declaring firmly

against retaliation for whistle blowing. *Badih* travels a developing path of cases going back at least to *Greene v. Hawaiian Dredging Co.* (1945) 22 Cal.2d 245, 157 P.2d 367. and *Tameny v. Atlantic Richfield Co.*, (1980) 27 Cal.3d 167, 178, 164 Cal.Rptr 839, 610 P.2d 1330, *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 699.

6. RETALIATORY DISCHARGE IS WITHOUT RECOURSE WITHIN THE WORKER'S COMPENSATION SYSTEM.

The taking of Plaintiff's job under the circumstances of this case is against fundamental public policy. The Worker's Compensation Board does not have authority to reverse the loss of plaintiff's job, only to provide compensation for her disability deficit. Labor Code under the Labor Commissioner (§ 98.7) (p. vxiii), can act to recover wages if the scope of the losses become apparent in 30 days, the Commissioner cannot restore a job. The section allows an action for damages as an alternative to the administrative process provided there. These processes, and the complaints they allow are outside the Worker's Compensation system and have an entirely different purpose. With dismissal from the County work force there is no true remedy for this job loss as promised by many Codes, rulings, and constitutional amendments, that have here been cited, these promises apparently a cruel myth.

Further "[w]hen a defendant has breached a duty arising out of the [workplace] contract, rather than merely a promise set forth in the contract, the plaintiff is entitled to tort relief" for wrongful discharge cases. *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal.App.2d 793, 797.

Even within the Labor Code Worker's Compensation is not the Exclusive Remedy.

All portions of the Labor Code are not subject to the Worker's Compensation system. The Labor Commission investigates wage and dismissal cases if the issues sort out within 30 days, but these cases may also be filed in directly in court. (See Labor Code § 98.7, (p. xxiii) Ex 60, Ex 2, "remedy not exclusive", also see § 6311, (p. xxi) Ex. 3 allowing "Right of action for wages.".)

7. PETITIONER COMPLIED WITH CALIFORNIA GOVERNMENT CODE § 911.2 REQUIRING CLAIMS TO BE FILED WITHIN SIX MONTHS.

Evidence of Compliance with Claims Act was Missed. (See Memorandum footnote page 4.)

Defendant's at the appellate stage raised a new issue. See Ex. of Record, Vol. III, Ex 23, CR 55, Exhibits, showing Claims were timely filed in compliance with the Calif. Claims Act (Calif. Gov. Code § 800 et. seq.) Also see County Board of Supervisor's date stamp, Ex. of Record, Vol III, Ex. 23. Claims were filed in compliance with requirements prior to filing the Complaint and all claims were amended to and incorporated in the Complaint as filed and the First Amended Complaint.

8. PETITIONER HAS STANDING TO ASSERT HER RIGHTS TO HER JOB AND WAGES THROUGH THE GOVERNMENT CODE.

California Government Code § 3503 Was Overlooked in the court's below.

Calif. Gov. Code § 3503 (p. xvii), speaks to the right of unions to represent their members, but "Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency." The union is permitted to represent members but union members retain right to represent themselves. Plaintiff's union did represent her in the lengthy attempts to arrange a meet and confer session with defendant's. (Ex. of Record, Ex. 6, p. 24 (CR 55)).

9. PETITIONER SHOULD HAVE STANDING TO ASSERT AND ACTION AGAINST TRESPASSER TO SECURE THE SAFETY OF HER PROPERTY, FREEDOM FROM HARASSMENT AND FREEDOM FROM ACTUAL DAMAGING TRESPASS.

Trespass and harassment are torts (Prosser and Keeton, Second Restatement) and may also be criminal activities when toxins are spread, as here. The essence of this cause of action was missed. Petitioner's cause of action was brought to stop County employees from further trespass upon her property, as they have trespassed two times and spread toxic materials without notice. Petitioner sought to (1) assure the safety and security of her home environment for her own physical needs, to (2) stop the trespass upon the property of a person already subjected to and disabled by workplace toxic exposure by the same agency (GSA, Sagers) and (3) assert her own right to fulfill her responsibility to assure safety to others who may enter into her environment. Jensen should have the standing in the state courts where this action was filed to protect the natural living creatures, including children, who come upon on her land and to

protect her home and land from the unnoticed application of toxic materials.

10. PUNITIVE DAMAGES SHOULD BE ALLOWED FOR SUCH DAMAGING ACTS.

For violation of whistle blower statutes, discrimination, and other violations of law punitive damages are allowed. *Watson v. Department of Rehabilitation* (App. 2 Dist. 1989) 261 Cal.Rptr. 204, 212, Cal App.3d 1271, and should be allowed in this case where violations are such a flagrant abuse of power and damages so great. Otherwise the county and county actors, and the County's contractors have less incentive to comply with the law.

CONCLUSION AND RELIEF SOUGHT

Plaintiff hereby requests that the United States Supreme Court hear the County and County defendant issues in this case on the points described above and review the interpretations of law, findings and conclusions as to Santa Clara County and County individual defendant's in this case.

Respectfully submitted FEBRUARY ___, 1996

By:

_____

CHERIEL JENSEN

Supreme Court, U.S.
FILED
951421 FEB 29 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

1996 Term

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

COUNTY OF SANTA CLARA, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANE MCKENNA, ZOE LOFGREN, RON GONZALES, ROD DIRIDON, MICHAEL HONDA, SALLY REID, PAUL SAGERS, PETER CLAUS, GEORGE TOKUSHIGE, DOWARD WASHINGTON, LEODE FRANKLIN, GREG WASENHOVE, IMELDA ELONZO, THOMAS FINN, ET. AL. THROUGH 100

Appellees & Respondents

No. 94-16824

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Cheriel Jensen, pro se
13737 Quito Road
Saratoga, CA 95070
1 408 379 0463

21 pp

DECLARATION OF CHERIEL JENSEN

I, CHERIEL JENSEN, declare the contents attached are true and correctly transcribed text of Orders and determinations which are the subject of my Petition for Writ of Certiorari:

Appendix 1. Order denying Petition for rehearing by the United States Court of Appeals for the Ninth Circuit, filed and entered December 1, 1995.

Appendix 2. Memorandum of the United States Court of Appeals for the Ninth Circuit filed and entered October 26, 1995, the judgment of the U. S. District Court for the Northern District of California affirmed in part and reversed in part.

Appendix 3. Judgment of the United States Court of Appeals for the Ninth Circuit filed and entered December 12, 1995.

Appendix 4. Order of the U. S. District Court for the Northern District of California filed January 18, 1994 dismissing individual government defendants and dismissing certain causes of action.

Appendix 5. Order of the U. S. District Court for the Northern District of California filed June 27, 1994 dismissing remaining causes as to County defendants and Finn, but not all defendants.

Appendix 6. Final order of the U. S. District Court for the Northern District of California dismissing all parties and causes, entered September 19, 1994

I declare under penalty of perjury that the following are true and correct text of the above listed orders and determinations which are the subject of this Petition.

EXECUTED on February 22, 1996

By: _____
CHERIEL JENSEN

Respectfully submitted February 29, 1996

By: _____
CHERIEL JENSEN

Appendix 1

FILED DECEMBER 1, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERIEL JENSEN Plaintiff - Appellant v. COUNTY OF SANTA CLARA; INSTAR PEST CONSULTANTS, INC.; APPLIED PEST MANAGEMENT.; GREGORY CLARK; et al., Defendants-Appellees.	)	No. 94-16063 No. 94-16824 D.C. No. CV-93-20617-JW **ORDER**

Before: FLETCHER, POOLE and O'SCANNLAIN, Circuit Judges.

The petition for rehearing is DENIED.

Appendix 2

FILED OCTOBER 26, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERIEL JENSEN Plaintiff -Appellant v. COUNTY OF SANTA CLARA; INSTAR PEST CONSULTANTS, INC.; APPLIED PEST MANAGEMENT INC.; GREGORY CLARK; et al., Defendants-Appellees.	)	Nos. 94-16824, 94-16824 D.C. No. CV-93-20617-JW **MEMORANDUM***

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted August 16, 1995
San Francisco, California

Before: Fletcher, Poole, and O'Scannlain, Circuit Judges.

Cheriel Jensen worked as an Associate Planner for the County of Santa Clara from May 1977 through July 10, 1993.[1/] The county hired Instar Pest Consultants, Inc., ("Instar") from 1983 to 1990 and Applied Pest Management, Inc., from 1990 to 1993 to provide pest control services for the building in which Jensen worked. On June 14, 1993, Jensen filed suit in Santa Clara County Superior Court against Instar, Applied Pest Management, Inc. and its representative, Gregory Clark (collectively, "APM"), the County, the County Board

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.

1/ Jensen was on sick leave and extended medical leave from July 1, 1992 through July 10 1993. She is now retired and receives disability benefits.

of Supervisors, five named individual supervisors, eight public employees, and the County's Workers' Compensation attorney, Finn (collectively, "county defendants"). Jensen sought damages for injuries allegedly due to pesticide exposure in the workplace.[2] Over Jensen's objections, defendant's removed the action to federal court. The county defendants, Instar, and APM each moved separately to dismiss Jensen's complaint.[3]

In an order dated January 18, 1994, the district court dismissed with prejudice thirteen of the county defendants and seventeen of Jensen's causes of action. The district court dismissed with leave to amend five of Jensen's claims against the remaining county defendant's. Jensen filed a First Amended Complaint on February 24, 1994. On April 28, 1994, the district court granted summary judgment and costs in favor of Instar, finding that Jensen's personal injury claims against Instar were time-barred by California's one-year statute of limitations. On June 7, 1994, Jensen filed a Second Amended Complaint against APM and a motion to remand to superior court. On June 16, 1994, the district court denied Jensen's motion for remand. On June 27, 1994, the district court entered an order dismissing Jensen's remaining claims from her first Amended Complaint against the county defendants. On September 19, 1994, the district court dismissed Jensen's Second Amended Complaint against APM and Clark pursuant to Fed. R. Civ. P. 41(b) for failure to comply with a court order.

Jensen now appeals the district court's dismissal of her claims against county defendant's, its grant of summary judgment in favor of Instar, its denial of her motion to remand, and its dismissal of her Second Amended Complaint against APM and Clark. She also argues that the district judge was unfairly biased against her. She seeks reinstatement of her claims and remand to state court. Jensen appeals have been consolidated. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

2/ Jensen sued 19 named and 100 unnamed defendants. Jensen asserted twenty-two causes of action including negligence, personal injury, failure to warn, violation of the right to freedom under the California Constitution, denial of civil rights in violation of 42 U.S.C. § 1983, retaliatory discharge, violation of the American's with Disabilities Act, fraudulent concealment, breach of contract, and violation of various state statutes.

3/ The county defendants also moved unsuccessfully for Rule 11 sanctions against Jensen.

I. JENSEN'S CLAIMS AGAINST THE COUNTY DEFENDANTS

Jensen appeals the district court's dismissals of each of her causes of action and of every county defendant.

A. Personal Injury

The district court dismissed with prejudice Jensen's claims of personal injury incurred in the scope of employment on the grounds that they were preempted by the California Worker's Compensation Act, Cal. Lab. Code §§ 3200-6240.

We review dismissals for lack of subject matter jurisdiction de novo. Carpenter v. DOT, 13 F.3d 313, 314 (9th Cir. 1994). The Worker's Compensation Act provides an exclusive remedy for an employee injured in the course of employment. Cal Lab. Code § 3600 (a). The Act exempts cases where the employer fraudulently conceals the existence of both the injury and its cause. Id. Jensen has not alleged that the County fraudulently concealed the existence of an injury. Thus, the exception does not apply to her case, and the district court's ruling must stand.

B. Claims Against Named Individuals

The district court dismissed on immunity grounds Jensen's claims against the five named members of the Board of Supervisors, the eight named public employees, and the County's Workers' Compensation attorney, Finn. We review the district court's decision regarding immunity of the county defendants de novo. See Harrison v. Hickel, 6 F.3d 1347, 1352 (9th Cir. 1993).

The five named members of the County Board of Supervisors are not vicariously liable for injuries caused by acts or omissions of the Board. Cal.Gov't Cod § 820.9. The eight named public employees are immune from liability for actions taken within the scope of their employment. Id. [4/] The communications between Finn and Jensen related to the adjudication of her Workers' Compensation claims are privileged and immune from tort liability. Cal. Civ. Code § 47(b); Rubin v. Green, 4 Cal.4th 1187, 1193-94 (1993). Therefore, Finn is also exempt from liability. We affirm the

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4/ Moreover, Jensen is time-barred from asserting personal injury claims against the county defendants as she filed suit outside of the six month statute of limitations. Cal. Gov't Code § 911.2

district court rulings with respect to the immunity of the government defendants.

C. Jensen's 1983 Claim.

The district court dismissed Jensen's claim against the county defendants pursuant to 42 U.S.C. § 1983 for failure to state a claim. We review that dismissal de novo. Everest & Jennings v. American Motorists Inc. Co., 23 F.3d 226, 228 (9th Cir. 1994). The district court correctly determined that Jensen has not cited to any constitutional or statutory provision which has been violated. Her claimed freedoms to eat, work, read, embrace one's children, and be free from puzzling illness, while desirable, are not protected by any federal statutory or constitutional provision.

D. The Americans with Disabilities Act

The district court found that Jensen could not file a claim under the American's with Disabilities Act, 42 U.S.C. §§ 12101-12213, ("ADA") because the ADA, which is not retroactive, took effect on July 26, 1992, and Jensen stopped work on July 1, 1992. We review the district court's application of the statutory provisions de novo. See Boone v. United States, 944 F.2d 1489, 1492 (9th Cir. 1991). The ADA is not retroactive. Burfield v. Brown, Moore, Flint, Inc., 51 F.3d 583, 588 (5th Cir. 1995); Raya v. Mayatt Industries, 829 F.2d 1169, 1174 (N.D. Cal. 1993). Jensen stopped working prior to the ADA's effective date. Thus, we affirm the district court's finding.

E. Standing

The district court found that Jensen lacked standing to sue for "misuse of authority" on behalf of the neighborhood children, her grandson, three opossums and five neighborhood cats who died, allegedly due to rat poisoning placed by agents of the County. It also found she lacked standing to sue for the County's alleged breach of her union collective bargaining agreement. We review those determinations de novo. Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 61 (9th Cir. 1994).

The district court was correct that Jensen lacks standing to sue on behalf of neighborhood animals that are not her property. It was also correct that she lacked standing to sue for the neighborhood children or her grandson since she was not their guardian ad litem. The district court was also correct that Jensen does not have standing

as a union member to sue the County for alleged breach of a collective bargaining agreement. See Cal. Gov't Code § 3503.

II. JENSEN'S CLAIMS AGAINST INSTAR

Instar ceased all pesticide consulting and application for the County in 1990. Jensen filed her complaint on June 14, 1993. Jensen argued that her claims were timely because she did not learn of the cause of her injury until June 12, 1992. The district court disagreed and dismissed Jensen's eighteen personal injury claims against Instar as time-barred by California's one-year statute of limitations for personal injury action, Cal. Civ. Proc. Code § 340(3).

Jensen raises numerous arguments on appeal to challenge the district court's dismissal of her claims against Instar. She argues, among other things, that her personal injury claims against Instar are not time-barred because she did not discover the cause of her injury until June 12, 1992, and that the district court did not address her claims against Instar for violation of the California Labor, Business & Professional, Food & Agriculture and Health & Safety Codes, and 7 U.S.C. § 136(i)-(j), all of which have statutes of limitations longer than one year.

We review the district court's grant of summary judgment de novo. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). The district court's dismissal on statute of limitation grounds is a mixed question of law and fact which we review for clear error. Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990); Schultz v. Department of Army, 886 F.2d 1157, 1159 (9th Cir. 1989).

A. Date of Discovery

Jensen suffered increasingly severe symptoms from 1977 to 1992. During that period, Jensen claims that she suspected the pesticide Malathion, which was sprayed by the state of California in 1979 to prevent the spread of the medfly, as the cause of her injuries. In 1981, she brought a legal action against the State of California and a helicopter company as a result of the Malathion medfly spraying.[5/]

5/ The case was dismissed for lack of prosecution.

On September 24, 1991, Jensen saw Dr. Ronald S. Greenwald, A neurologist. Dr. Greenwald wrote a letter dated September 30, 1991 to Jensen's referring physician which stated:

> This is a 52-year old, right handed white female with a long history dating back ten years ago of being poisoned with Malathion and lindane together. This was exposed to her skin for over 24 hours when they were spraying for the medfly outbreak ten years ago. She states that this was the beginning of her injury and accident . . . . She states that she has had many reactions to malathion. . . .

Jensen claims that she did not suspect that her injuries were caused by Instar's spraying of the Safrotin in her workplace until June 12, 1992. On that date, Jensen observed APM agents spraying Safrotin at her office during working hours, and suffered acute physical symptoms. Upon discovering the cause of her symptoms, Jensen lead an effort to evacuate the building.

The discovery rule tolls California's one year statute of limitations for personal injury actions until such time as the plaintiff is or should reasonably be aware of her injury and its negligent cause. Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1109 (1988). The limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged. Id. at 1114. A plaintiff is held to actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. Id. at 1109.

Prior to June 12, 1992, Jensen had no reason to suspect that Safrotin, a possible cause of her injuries, was being applied in her workplace. Until that date, when she acquired actual knowledge of spraying, Jensen reasonably believed that her earlier Malathion exposure was the sole cause of her injuries. Dr. Greenwald's letter supported her hypothesis. We therefore find that the limitations period began to run on June 12, 1992, when Jensen first had reason to believe that pesticides sprayed in her workplace could be causing her injuries. Jensen's June 14, 1993 filing fell within the California one-year statute of limitations for personal injury actions and is therefore timely. Accordingly, we reverse the district court's holding on this issue.[6/]

6/ We therefore need not reach Jensen's other arguments regarding the district court's dismissal of her personal injury claims against Instar.

B. Statutory Causes of Action

Jensen does not have standing to sue the statutory provisions she cites in her complaints. The California statute requiring a pest control company to notice the owner and tenant of the premises on which work is to be done does not apply to Jensen as an employee of the owner and tenant of the premises. See Cal. Bus & Prof. Code § 8538. The duties of an employer stipulated by California's Occupational Safety & Health law do not apply to employers who are governmental entities. Cal. Lab. Code § 6434. Federal and state pest Control regulations do not give Jensen a right to sue. See 7 U.S.C. §§ 136 -136y (Administrator of the Environmental Protection Agency has authority to enforce federal pesticide control regulations); Cal. Food & Agric. Code § 11501.5 (director and commissioner of each county have authority to enforce regulations of pest control operation); California Health and Safety Code §25249.7(d) (individual may sue in public interest only after she has given notice to Attorney General and district attorney and they do not prosecute said violation.)

III. REMAND

Jensen's original complaint and her First Amended Complaint each contained federal causes of action for violations of 42 U.S.C. § 1983 and the ADA. Jensen's Second Amended Complaint contained only state causes of action. Despite the fact that the federal claims had dropped out of the suit, the district court retained jurisdiction and dismissed Jensen's Second Amended Complaint. Jensen appeals the district court's failure to remand this case back to superior court. 7/

We review de novo the district court's denial of Jensen's motion to remand. Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir.) cert. denied, 115 S.Ct. 351 (1994). We hold that the district court did not err by retaining jurisdiction over Jensen's remaining state law claims. A ederal court may retain jurisdiction of pendent state law claims, even when the federal claims are dropped from the suit, when the district court determines that retaining jurisdiction "best serves the principles of economy, convenience, fairness and comity." Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988). Jensen's federal cause of action dropped out at an advanced stage of this proceeding. See id. at 350 (when federal causes of action drop out early from an action, court may wish to

7/ Jensen earlier asked the district court not to remand this case because she found the federal building an "easier facility" than the state courthouse in light of her claimed physical condition.

exercise discretion to remand remaining state law claims). Moreover, the federal questions stemmed from the same nucleus of operative fact as did Jensen's numerous state law claims. The district court correctly determined that it best served the principles of judicial economy to retain jurisdiction over Jensen's pendent state law claims. See id. at 357.

IV. JENSEN'S CLAIMS AGAINST APM

The district court directed Jensen to file a Second Amended Complaint setting "forth the allegations contained in her Second and Third Claims only against Defendant's Applied Pest Management, Inc. and Gregory Clark.[8/] All other claims and defendant's have been dismissed, and Plaintiff's second Amended Complaint should so indicate." On May 4, 1994, Jensen filed a Second Amended Complaint without leave of the court. She moved for reconsideration on May 12, 1994. The district court entered an order striking Jensen's Second Amended Complaint on May 16, 1994. Jensen refiled her Second Amended Complaint with leave of the court on June 7, 1994. On June 27, 1994, the district court denied her motion for reconsideration.

Jensen revised the caption of her complaint and deleted the paragraphs setting forth the causes of action that had been dismissed. However, Jensen realleged these dismissed causes of action in Paragraph XIII of her Second Amended Complaint as evidence of negligence. Paragraph XIII charges APM with reckless disregard for life, health, and safety; lack of notice; deliberate concealment; aggravation of injury; violations of the California Labor, Business & Professional, Food & Agriculture and Health & Safety Codes. In that paragraph, Jensen notes that "violation of statutes is cited here as evidence of negligence and not as legal action under the cited statutes."

The district court found that the Second Amended Complaint "contains all of her claims against all of the defendants which have been dismissed in this action." The court dismissed the complaint with prejudice pursuant to Fed. R. Civ. P. 41(b) for Jensen's failure to comply with a court order.

District courts have the power to dismiss claims with prejudice for failure to comply with an order of the court. Von Bronkhorst v.

8/ These claims raised allegations of negligence per se, ultra hazardous activity, willful creation of dangerous condition of property, negligence and failure to warn as tort.

Safeco Corp., 529 F.2d 943, 947 (9th Cir. 1976). Dismissal is a severe remedy. District courts may impose this sanction only after weighing five factors: (1) the public interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the litigants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability or less drastic sanctions. Ferdik v Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.), cert denied, 113 S. Ct. 321 (1992); Thompson v. Housing Authority of Los Angeles, 782 F.2d 829, 831 (9th Cir), cert. denied, 479 U.S. 829 (1986).

We review for abuse of discretion the district court's dismissal of the action for failure to comply with a court order. Thompson, 782 F. 2d at 832; Von Bronkhorst, 529 F.2d at 947-48. Because the district judge is in the best position to assess the circumstances, we give Judge Ware's determination that Jensen failed to comply with the order considerable weight on appeal, Von Bronkhorst, 529 F.2d at 947-48. However, we note that dismissal is a harsh sanction reserved for extreme circumstances, Thompson, 782 F.2d at 83.

We apply the five-factor test and conclude that Jensen's partial noncompliance does not merit dismissal of her Second Amended Complaint. The district court had an interest in the expeditious resolution of this litigation and need to control its docket. Jensen, however, did not deliberately stall the proceedings and in fact attempted to conform her Second Amended Complaint to the court's order. Although she did not comply fully, Jensen, a prose plaintiff, 9/ did modify her complaint in a manner consistent with the order. Dismissal severely prejudiced Jensen and eliminated any chance she had to adjudicate her case on the merits. Moreover, the court had at its disposal the less drastic sanctions of striking Paragraph XIII from the Second Amended Complaint or ordering Jensen to file an additional amended complaint deleting the remaining non-conforming claims and defendants. We therefore hold that the district court abused its discretion by dismissing Jensen's Second Amended Complaint. We reverse the district court's dismissal of Jensen's Second Amended Complaint.

9/ APM argues that Jensen' admission that she is not the "run of the mill plaintiff" because her brother is an attorney and because she has previous legislative experience weakens her claims for special treatment as a pro se plaintiff. We disagree. Jensen is not an attorney, and despite her relation to an attorney, we should not treat her as such.

V. BIAS OF THE DISTRICT COURT JUDGE

Jensen alleges for the first time on appeal that Judge Ware was biased against her because he was also assigned on a random basis to preside over Jensen's defamation suit against one of her doctors. Judge Ware remanded that suit to state court. Because Jensen failed to file an affidavit of judicial bias with Judge Ware during the pendancy of the district court proceeding, we cannot address her claim of judicial bias. See 28 U.S.C. § 144. Moreover, we find no merit in Jensen's arguments for recusal. See United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (alleged prejudice must result from an extrajudicial source; a judges prior adverse ruling is not sufficient cause for recusal).

VI. CONCLUSION

The district court's dismissal of Jensen's personal injury claims against Instar and its dismissal of Jensen's Second Amended Complaint are **REVERSED** and **REMANDED** for proceedings consistent with this memorandum disposition. All other rulings of the district court are **AFFIRMED.**

Appendix 3

stamped: **FILED DECEMBER 12, 1995**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16063
Ct/AG#: CV-93-20617-JW

CHERIEL JENSEN
Plaintiff - Appellant

v.

COUNTY OF SANTA CLARA, INSTAR PEST CONSULTANTS, INC., et al
Defendants - Appellees

NO. 94-16824
Ct//AG#: CV-93-20617-JW

CHERIEL JENSEN
Plaintiff - Appellant

v.

COUNTY OF SANTA CLARA, APPLIED PEST MANAGEMENT., GREGORY CLARK, et al.,

Defendants - Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Jose).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part and REVERSED and REMANDED in part.

Filed and Entered October 26, 1995

Appendix 4

stamped **FILED January 18, 1994**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHERIEL JENSEN, Plaintiff, vs. (1) COUNTY OF SANTA CLARA, (2) THE SANTA CLARA BOARD OF SUPERVISORS, (3) DIANE MCKENNA, (4) ZOE LOFGREN, (5) RON GONZALES, (6) ROD DIRIDON, (7) MICHAEL HONDA (8) SALLY REID, (9) PAUL SAGERS, (10) PETER CLAUS (11) GEORGE TOKUSHIGE (12) DOWARD WASHINGTON (13) APPLIED PEST MANAGEMENT, INC., (14) GREGORY CLARK, (15) INSTAR PEST CONSULTANT'S, INC., (16) LEODE FRANKLIN, (17) GREG WASENHOVE, (18) IMELDA ELONZO, (19) THOMAS FINN, DOES 1 THROUGH 100 Defendants.	)	CASE NO. C 93-20617 JW ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND

Defendants County of Santa Clara, The Santa Clara County Board of Supervisors, Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon, Michael Honda, Sally Reid, Paul Sagers, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove, Imelda Elonzo, and Thomas Finn, move (1) to dismiss the complaint against them; (2) to strike portions of the complaint; and (3) for a more definitive statement. Defendants Applied Pest Management, Inc. and Gregory Clark also filed a motion to dismiss, to strike and for a more definite statement.

The Court notes that defendant Instar Pest Consultant, Inc. has appeared in pro se by a responsive pleading and a cross complaint filed by its president, but that it has not, made any motion which is currently before the Court.

INTRODUCTION

Plaintiff is seeking to recover damages for alleged exposure to pesticides at her place of employment. In a complaint containing twenty-two causes of action Plaintiff sues all above-named Defendants on several different causes of action. She claims to have incurred a multitude of symptoms stemming from the use of pesticides at her place of employment. The symptoms include crippling leg cramps, disturbed moisture balance, disturbed bowels, and visual disturbance. She also claims she is suffering from ongoing medical conditions, including deteriorating spine, loss of sensation in legs and hands, loss of hair, skin rash, dizziness, headache, and flu-like symptoms.

Plaintiff worked for fourteen years as a Planner III for Santa Clara County with expertise in General, Regional, Rural Planning and Environmental Planning including air quality chemistry, water quality chemistry, map making, data generation design of its use for studies. She worked primarily at the Civic Center Complex in the east wing of 70 West Hedding.

She never saw any notice posted that pesticides were being used, or had been used and claims to have no reason to believe that pesticide had ever been used in the building.

DISCUSSION

1. The Members of the Board of Supervisors are immune from liability.

Plaintiff asserts that Defendants Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon and Michael Honda are members of the Santa Clara County Board of Supervisors. Comp. at 2:11-12. California Government Code Section 820.9 provides that members of the Board of Supervisors . . . are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body." Plaintiff has not alleged any intentional wrongdoing that might defeat this immunity. Plaintiff has only alleged vicarious liability of these defendants because they were members of the Board of Supervisors. It was the County, not the actual Board, according to the complaint, that contracted with the pest control entities.

Accordingly, Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon and Michael Honda, are DISMISSED with prejudice from this action.

2. Santa Clara County Employees are immune form liability.

Plaintiff's complaint alleges that Defendants Sally Reid, Paul Sager, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove and Imelda Elonzo are all public employees of the County of Santa Clara. Compl. at 2:19-3:23. She also alleges that each of these public employees inflicted injury upon her as a result of the employee's decision-making and/or oversight authority. Each of these employees is immune from personal liability under Section 820.2 and must be dismissed.

Accordingly, Sally Reid, Paul Sagers, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove and Imelda Elonzo are DISMISSED with prejudice from this action.

AS TO DEFENDANTS COUNTY OF SANTA CLARA AND BOARD OF SUPERVISORS

3. The Worker's Compensation Act preempts Plaintiff's First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Sixteen, Seventeenth, Eighteenth, Twenty-first and Twenty-second claims.

Sixteen of Plaintiff's twenty-two claims are preempted by California's Worker's Compensation Act, Labor Code Sections 3200-6240. These claims all are allegations of personal injury allegedly incurred in the course and cope of employment. Liability for work-related injuries under the Act is "in lieu of any other liability whatsoever to any person," except for a few narrow exceptions that, do not apply to this case. Labor Code § 3600 (a); Bell v. Macy's California, 212 Cal App. 3d 1442, 1448 (1989).

Plaintiff's complaint concede on its face that she "is and at all times herein stated [was] a Santa Clara County Employee from May 1977 injured by the illegal application and exposure to pesticides. . . . " Compl. at 2:2-4. She further states that she "was exposed to restricted materials, toxic pesticides, applied by the county and its agents during working her [sic] hours, 9:00am to 6:00pm, during night and week end meetings, and while working overtime in service to the county at her workplace. . . . These exposures have now disabled plaintiff." Compl. at 15:5-8, 12. Plaintiff's complaint is a binding admission that her purported injuries allegedly arose out of and in the course of her employment. See Smith v. Walter E. Heller & Co., 82 Cal.App. 3d 259, 269 (1978) (allegation of a pleading is conclusive judicial admission).

In her eighteenth and twenty-first claims, Plaintiff tries to invoke the fraudulent concealment exception to exclusivity set forth in Labor Code Section 3602(b)(2). According to Santiago v. Firestone Tire & Rubber Co., 224 Cal.App. 3d 1318, 1334 (1990), Plaintiff must show that the County had actual knowledge of her injuries; constructive or imputed knowledge is insufficient. Risk of disease or injury is also insufficient. McDonald v. Superior Court, 180 Cal. App. 3d 297, 303 (1986). Plaintiff has failed to allege any facts that Defendants were aware the injuries existed (not its alleged cause) and fraudulently concealed this from her.

Plaintiff also tries to involve Labor Code Section 3706 which provides "if any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." In the complaint itself Plaintiff states that Defendant did in fact secure the payment of compensation because the county is self-insured for worker's compensation purposes.

Even though Plaintiff has alleged other statutory violations, the workers compensation statute overrides those claims See Potter v. Arizona Coach Lines, Inc. 202 Cal. App. 3d 126, 134 (1988) ("Conduct which may appear to violate provisions of different statutes still may fall within the provisions of the Worker's Compensation Act."); see also Nation v. Certained Cor., 84 Cal. App. 3d 813, 817 (1978) ("aggravation of the original industrial injury by medical treatment has been held to be a foreseeable consequence of the original compensable injury, compensable within the workers' compensation proceeding and not the proper subject of an independent common law damage proceeding against the employer.")

The sixteen claims which are preempted by the Workers' Compensation Act are also subject to dismissal under Federal Rule of Civil Procedure 12(b) (1) for lack of subject matter jurisdiction since Plaintiff has failed to state facts negating the exclusivity of her workers' compensation remedy for her work-related injuries.

Plaintiff also includes a Civil Rights claim in her tenth claim. However, it must be pled more specifically because the allegations are so vague and ambiguous the defendant's cannot respond.

In order to state a claim under Section 1983 for a violation of civil rights, Plaintiff must allege two essential elements: (1) a violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a

person acting under the color of state law. West v. Atkin, 487 U.S. 42, 48 (1988).

The Supreme Court has directed trial courts to liberally construe pro se papers, Hughes v. Rowe, 449 U. S. 5, 9 (1980), especially where civil rights claims are alleged. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Federal Rule of Civil Procedure 12 (e) allows a party to move for a more definitive statement "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." As discussed, above, Plaintiff alleges violations of federal rights but fails to identify which purported rights were violated or how or when they were violated. Without this information, Defendants cannot possibly respond to the charge that they have deprived Plaintiff of these rights. Furthermore, these claims are excludable under worker's compensation if they turn out to be mere repetitions of Plaintiff's personal injury claims.

Accordingly, Plaintiff's First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Sixteenth, Seventeenth, Eighteenth, Twenty-first and Twenty-second claims are DISMISSED against Defendants County of Santa Clara and the Santa Clara County Board of Supervisors. However, with respect to the tenth claim, Plaintiff has twenty (20)days from the date of this order to amend the complaint to state a Civil Rights claim.

4. Fifteenth and nineteenth claims are vague and ambiguous.

These two claims do not specify any factual sources of liability -- statutory, constitutional, common-law or other -- attaching to such alleged behavior by Defendants. Furthermore, Plaintiff makes no allegation of any resulting injury to persons and fails to cite a specific code section in the claim that Defendants maintained a contract to apply pesticides without demonstrated need or the existence of pests. No law is cited allowing Plaintiff to maintain such a claim.

Accordingly, the fifteenth and nineteenth claims are DISMISSED. Plaintiff has twenty (20) days from the date of this order to amend the complaint to specifically indicate the sources of liability and any resulting injury to persons stemming from the alleged acts.

5. Plaintiff's thirteenth and fourteenth claims under the Americans with Disabilities Act must be dismissed because Plaintiff has not pled the requisite facts with adequate specificity.

It is unclear if Plaintiff's claims are covered by the Americans with Disabilities Act ("ADA") because of ambiguity in the dates contained in the complaint.

The ADA became effective on July 26, 1992, and does not apply retroactively. Pub. L. No., 101-336, §108; Binder v. Emerson Elec. Co., 1992 WL 442111 (E.D. Mo.). Plaintiff argues that her claim matured when she was unable to be accommodated by the County after they caused her medical condition. No specific date was provided in the complaint for this date of non-accommodation. According to 42 USC § 2000(e)(5)(1) Plaintiff must have filed her claim within 300 days of its maturing.

Furthermore, Plaintiff has failed to allege that she received any "right-to-sue" letter as required under 42 USC § 12117; Kent v. Director, mo. Dept. of Elem. & Sec., Educ., 792 F.Supp. 59, 62 (E.D. Mo. 1992).

Accordingly, the thirteenth and fourteenth claims against the County and the Board of Supervisors are DISMISSED with twenty (20) days from the date of this order to amend the complaint to specify the required deadlines were met.

6. Plaintiff's sixth claim, based on Proposition 65 must be dismissed because the statute does not apply to governmental entities.

Plaintiff alleges that Defendants have violated Proposition 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5-25249.13. This claim must be dismissed because Proposition 65 does not apply to government entities. The statute explicitly excludes "any city, county, or district or any department or agency thereof. . . ." Health and Safety Code § 25249.11(b).

Accordingly, the sixth claim is DISMISSED with prejudice.

7. Plaintiff may not bring a claim for punitive damages against the County.

In her prayer for relief, Plaintiff seeks punitive damages of an unspecified amount against unidentified defendants. Complaint at

28:21-25. Under Section 818 of the Government Code, the County cannot be liable for punitive damages. Section 818 provides: "Notwithstanding any other provisions of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or any other damages imposed primarily for the sake of example and by way of punishing defendant."

Accordingly, Plaintiff's prayer for punitive damages is hereby stricken.

8. Sixteenth Claim.

It merely appears that this claim is a restatement of earlir allegations. No new claim is described. Accordingly, this clim is DISMISSED pursuant to Federal Rule of Civil Procedure 12 (). Plaintiff has twenty (20) days from the date of this order to mend the complaint.

9. Eighteenth Claim

The Court dismisses this claim pursuant to Rule 12(f), and 12(b)(6) but will allow Plaintiff twenty days from the date of this order to amend the complaint.

10. Nineteenth Claim

As no causation, code section or damages are alleged Plaintiff fails to state a claim. Accordingly, this claim is DISMISSED. Plaintiff has twenty (20) days from the date of this order to amend the complaint.

11. Twentieth and Twenty-second Claims:

The Defendants APM/CLARK are not Plaintiff's employer and thus these claims can not apply to them. Accordingly, these claims are DISMISSED with prejudice against Defendants APM/CLARK.

IT IS SO ORDERED.
[*signed*] DATED: January 14, 1994

James Ware
Honorable James Ware
United States District Judge

Appendix 5

[*stamped*] **FILED JUNE 27, 1994**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT

CHERIEL JENSEN, Plaintiff	)	No. CV-93-20617-JW
v.	)	ORDER GRANTING IN
	)	PART AND DENYING
COUNTY OF SANTA CLARA, et al.,	)	IN PART DEFENDANTS'
	)	MOTIONS TO DISMISS
Defendants	)	AND DENYING MOTION
	)	FOR RECONSIDERATION

Defendants Applied Pest Management ("APM"), Gregory Clark ("Clark"), County of Santa Clara ("County"), the Santa Clara Board of Supervisors ("Board") and Thomas Finn ("Finn") motions to dismiss Plaintiff's First Amended Complaint was submitted on the papers. Plaintiff's Motion for reconsideration of the court's order striking her second amended complaint was also submitted on the papers. Having reviewed all pleadings filed to date, and good cause appearing therefor, the Court GRANTS in part and DENIES in part Defendant's motion to dismiss, as discussed below. The Court also DENIES Plaintiff's motion for reconsideration.

I. BACKGROUND

The factual and procedural background have been discussed in the Court's previous orders granting Defendants' motions to dismiss, as well as the Court's order granting summary judgment in favor of Instar Pest Consultants. Therefore, it will not be reiterated herein.

II. LEGAL STANDARDS

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enterprises, 476 F.2d 393, 396 (9th Cir. 1973). Fraud claims must be plead with particularity. Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991).

III. DISCUSSION

A. APM/Clark's Motion to Dismiss

Defendants APM and Clark move to dismiss the first, second, third, sixth, fourteenth, sixteenth, and eighteenth claims from Plaintiff's First Amended Complaint.[1] Each of these claims is addressed separately below.

1. First Claim

With respect to Plaintiff's first claim for relief, based upon "Intentional Sweeping Violation of Statutes", Plaintiff contends that Defendants APM and Clark violated certain provisions of the Labor Code, the California Business and Professions Code, the Food and Agriculture Code, the California Code of Regulations, the Health and Safety Code and Title 7 U.S.C. Sections 136i1(a) and (c), 136j(a)2(b)(i)(ii)(iii) and 136j(a)(2)G. However, Plaintiff's complaint once again fails to state a claim for relief against Defendants under any of these provision.

Defendant's are not Plaintiff's employer and cannot, therefore, be held liable to her under the Labor Code provisions. The Business and Professions Code, the Food and Agriculture Code, nor the Health and Safety Code provide for private civil actions such as Plaintiff's to be brought against Defendants. Plaintiff has failed to show that she has exhausted all required administrative remedies pursuant to the California Code of Regulations and cannot, therefore, maintain a claim under such Regulations. Finally, Plaintiff has failed to plead sufficient facts to show that Defendant's failure to comply with certain provisions of Title 7 caused her injury. Therefore, the Court hereby GRANTS Defendants' APM and Clark's motion to dismiss Plaintiff's first claim.

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[1] Defendants APM and Clark also move for a more definite statement as to Plaintiff's third, fourteenth and eighteenth claims and move to strike Plaintiff's first, third, sixteenth and eighteenth claims. However, since the Court grants Defendants' motion to dismiss all claims except the third, these alternative motions are moot. With respect to Plaintiff's third claim, the Court finds that such claim adequately states a claim for failure to warn and is not redundant. Therefore, Defendants' motions for a more definite statement or to strike are denied

2. Second Claim

Defendants also move to dismiss Plaintiff's second claim, that the application of pesticides constitutes an ultra-hazardous activity, on the basis that such activity is not ultra-hazardous as a matter of law. Though Defendant's are correct in stating that the issue of whether an activity is ultra hazardous or abnormally dangerous presents a question of law for the court, Ahrens v. Superior Court, 197 Cal.App.3d 1134 (1988), the factors which the Court must consider to determine such questions involve factual issues which are not properly resolvable on a motion to dismiss.

As stated above, in evaluating Defendants' motion to dismiss, the Court must accept all allegations contained in the complaint as true, and must construe any ambiguities existing in those allegations in favor of the Plaintiff. Plaintiff's second claim for relief, on its face, states a valid cause of action for engaging in an ultrahazardous or abnormally dangerous activity. In reviewing the factors set forth in the Restatement of Torts 2d, Section 520, the Court cannot conclude that Plaintiff's pleading is inadequate and fails to state a claim for relief. In evaluating all the factors taken together, as the Court must, it is not apparent from the face of the complaint that the application of the pesticide did not, in fact, constitute an ultra-hazardous or abnormally dangerous activity. Therefore, Defendants' motion to dismiss Plaintiff's second claim is hereby DENIED.

3. Third Claim

Defendants move to dismiss Plaintiff's third claim, willful creation of a dangerous condition of property, negligence and failure to warn on the basis that such claim is "redundant". However, Defendants do not state how or why such claim is allegedly redundant and the Court does not find such claim to be redundant. Therefore, the Court DENIES Defendant's motion to dismiss Plaintiff's third claim.

4. Sixth Claim

Plaintiff's sixth claim, based upon violation of the California Health and Safety Code, must be dismissed on the basis that Plaintiff cannot maintain a private damage action under Proposition 65. Section 25249.7(d) only permits actions to be brought "in the public interest". Here, Plaintiff is clearly seeking monetary damages for her own personal injuries. Further, there is no allegation that Plaintiff complied with Proposition 65's notice requirements. Therefore, Defendants' motion to dismiss Plaintiff's sixth claim is GRANTED.

5. Fourteenth Claim

Defendants also move to dismiss Plaintiff's fourteenth claim under the American with Disabilities Act, since such Act is not retroactive and does not apply to conduct prior to July 26, 1992. Title 42 U.S.C. § 12111(5)A. Plaintiff's last day of work was July 1, 1992. Therefore, Plaintiff's fourteenth claim is DISMISSED.

6. Sixteenth Claim

Defendants move to dismiss Plaintiff's sixteenth claim for damages on the basis that, as noted above, Defendant's APM and Clark are not Plaintiff's employer, and cannot, therefore, be held liable to Plaintiff under Labor Code Section 2800. This claim is hereby DISMISSED.

7. Eighteenth Claim

Finally, Defendants move to dismiss Plaintiff's eighteenth claim which is a mishmash of several different claims. The Court finds that, even evaluating each claim separately, Plaintiff cannot state a claim for relief against these Defendants. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiff's eighteenth claim.

8. Statute of Limitations

As the Court previously determined in its order granting Instar's motion to summary judgment, Plaintiff learned that she was injured by pesticides as early as 1977. However, Plaintiff did not file her complaint until June of 1993. Therefore, applying California Civil Code Section's 340(3) time limit, Plaintiff may seek recovery for damages she sustained only for the time period from June 14, 1992 through June 14, 1993. All time prior to and following this period is barred by the one-year statute of limitations.

9. Punitive Damages

Defendants also request that Plaintiff's prayer for punitive damages be stricken against them. California Civil Code § 3294 allows for the recovery of punitive damages only where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, malice or fraud. Here there is no allegation, which has survived Defendant's motion to dismiss, that indicates that any of Defendants acts oppressively, fraudulently or with malice.

Therefore, the Court GRANTS Defendants' motion to strike Plaintiff's prayer for punitive damages.

B. County/Board/Finn's Motion to Dismiss

The County and the Board move to dismiss Plaintiff's tenth, thirteenth, fourteenth and twentieth claims. Finn moves to dismiss Plaintiff's seventeenth and twenty-first claims. All three Defendants move to strike Plaintiff's prayer for inductive relief and request Rule 11 sanctions.

1. Tenth Claim

Plaintiff's tenth claim is purportedly based upon violations of her alleged "freedoms", however, her complaint again fails to cite a federal statute or constitutional provision which protects these alleged freedoms. Accordingly, Defendants' motion to dismiss Plaintiff's tenth claim is GRANTED.

2. Thirteenth and Fourteenth Claims

Plaintiff's claims based upon alleged violations of the American's with Disabilities Act ("ADA") must be dismissed because they are based upon conduct which occurred prior to the effective date of ADA, as discussed in Section A.5., above. Accordingly, the Court GRANTS Defendants' motion to dismiss Plaintiff's thirteenth and fourteenth claims.

3. Fifteenth Claim

Plaintiff's fifteenth claim for "misuse of authority" again fails to allege any statutory, constitutional, common law or other source of liability against Defendants. Plaintiff also lacks standing to maintain an action on behalf of the neighborhood children, her grandson, three opossums and five neighborhood cats. Therefore, Plaintiff's fifteenth claim is DISMISSED.

4. Twentieth Claim

Plaintiff's twentieth claim is based upon Defendants' alleged breach of a collective bargaining agreement entered between moving Defendants and Service Employees Local 715 International Union. However, even if such allegations are true and the agreements was breached, Plaintiff may not maintain an independent action under the agreement. Plaintiff lacks standing, as an individual, to sue under the

terms of the Agreement. Rather, the Union must maintain such action. Therefor, Plaintiff's Twentieth claim is DISMISSED.

5. Fifteenth and Seventeenth Claims

Defendant Finn, council of record in Plaintiff's ongoing worker's compensation proceeding, moves to dismiss the fifteenth and seventeenth claims against him on the basis that he is immune from suit pursuant to California Civil Code Section 47(b). Section 47(b) provides that a publication is privileged in any legislative or judicial proceeding. Here Plaintiff is complaining about Defendant Finn's advice to her during her workers compensation proceeding. Pursuant to Section 47, Defendant Finn's advice to Plaintiff is privileged. Accordingly, the Court hereby GRANTS Defendant Finn's motion to dismiss Plaintiff's seventeenth and twenty-first claims.

6. Injunctive Relief

Plaintiff's prayer for inductive relief includes a demand for indictment of the Defendants and seeks relief on behalf of third parties. Both requests are improper and are hereby STRICKEN.

7. Rule 11 Sanction

Defendants' request Rule 11 sanctions "if they are forced to proceed further". However, the Court has granted their motion to dismiss in its entirety. Therefore, they are dismissed from this action and will not have to proceed further. Defendants' request for Rule 11 sanctions is DENIED.

C. Motion for Reconsideration

Plaintiff moved for reconsideration of the Court's prior order striking her Second Amended Complaint. based upon the pleadings filed to date, and good cause appearing therefore, the Court DENIES Plaintiff's motion. Plaintiff is instructed to file a Second Amended Complaint in conformity with this Order. Namely, Plaintiff's Second Amended Complaint shall set forth the allegations contained her Second and Third Claims only against Defendants Applied Pest Management, Inc. and Gregory Clark. All other claims and defendants have been dismissed, and Plaintiff's Second Amended Complaint should so indicate.

IV. CONCLUSION

Based on the foregoing, the Court hereby GRANTS Defendant's motion to dismiss as to all the claims and all Defendants, with the exception of Plaintiff's second and third claims against Defendants APM and Clark. The Court also DENIES Plaintiff's motion for reconsideration.

IT IS SO ORDERED
DATED June 27, 1994
James Ware
United States District Judge

Appendix 6

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT

CHERIEL JENSEN, Plaintiff	)	No. CV-93-20617-JW
v.	)	ORDER GRANTING DEFENDANTS'
COUNTY OF SANTA CLARA, et al., Defendants	)	MOTION TO DISMISS

Defendants Applied Pest Mangement and Gregory Clark's (collectively, "Defendants"), motion to dismiss Plaintiff's Second Amended Complaint was submitted on the papers. Good cause appearing therefor, the Court GRANTS Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 41(b). Plaintiff has failed to comply with this Court's order, dated June 27, 1994, in which she was instructed to delete all defendants and all claims and to file an amended complaint setting forth only those allegations contained in her second and third claims of her First Amended Complaint against only these moving Defendants. In defiance of that order, Plaintiff has filed a Second Amended Complaint which contains all of her claims against all of the defendants which have been dismissed from this action. Accordingly, pursuant to Rule 41, the Court DISMISSES Plaintiff's Second Amended Complaint.

IT IS SO ORDERED.
DATED: September 16, 1994
James Ware
JAMES WARE
United States District Judge